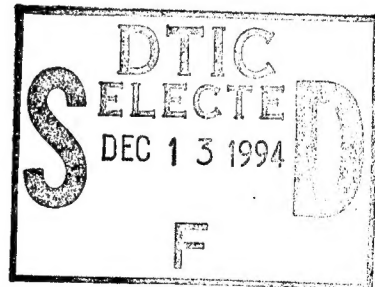


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The Rise and Fall of Operational Flexibility

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THE RISE AND FALL OF OPERATIONAL FLEXIBILITY

Today's action assures that the Clean Air Act will be implemented as intended by Congress to protect the health of all Americans. It reflects the Clinton administration's commitment to fully involve citizens in decisions that directly affect them. The Quayle Council is out of business.

EPA Administrator Carol Browner, July 8, 1994¹

I. INTRODUCTION

On July 8, 1994, the EPA repropoed the final operating permit regulation² which implements the permit modification,³ and operational flexibility⁴ sections of Title V of the Clean Air Act Amendments of 1990. These sections were hastily assembled, their scope, breadth and impact ill conceived by the drafters in the Bush Administration and subsequently by Congress in its zeal to revamp the Clean Air Act. Since enactment they have been controversial, with industry, states, and environmentalists, filing suit⁵ to overturn the operating permit regulation proposed by EPA to implement them.⁶

Why have the operational flexibility and the permit modification procedures proven so controversial? Are they a "rubric" to provide industry a method by which it may overcome permit restrictions and avoid public participation requirements, or a method by which industry may rapidly respond to changing market conditions with a minimum of regulatory review. This paper seeks to answer these questions as it traces the development of operational flexibility and permit modification provisions from their creation in Congress, rise through the EPA rulemaking process, and fall in the Clinton Administration's reproposal of the operating permit regulation.

II. DEVELOPMENT OF AN AIR PERMIT REQUIREMENT

A. Call For An Air Permit System

Commentators have recognized that the pre-1990 Clean Air Act had serious defects.⁷ These included a cumbersome statutory structure, inflexibility and a failure to respond to economic concerns. An air permit system, similar to the National Pollutant Discharge Elimination System (NPDES) permit used to control discharges of pollutants to water in the Clean Water Act,⁸ was proposed for use in the Clean Air Act. The new permit system would require sources that discharge pollutants to the atmosphere to obtain a permit. It would rely upon fixed term, source specific, state issued permits to regulate pollution sources.⁹ Perceived advantages of the permit system included elimination of delay in approval of routine changes through permits rather than by the dual state and federal proceedings required to modify a State Implementation Plan (SIP),¹⁰ referred to as the "double key" issue.¹¹ A permit system had the additional advantage in that it could serve as the foundation for a marketable permit system, provide for waivers of certain requirements, and allow state permits to take effect unless disapproved by EPA, rather than requiring an affirmative showing by EPA.

A permit system would significantly enhance enforcement by identifying in the permit all of the compliance requirements for an emissions source. Regulators would not have to resort to the SIP to prove violations.¹² Despite the benefits of a federal operating permit system, it was not a priority of the either Congress¹³ or the Reagan administration.

B. The Air Permit System Overshadowed By Other Legislative Initiatives

The Bush Administration sought to break the eight year logjam on air legislation¹⁴ by developing a proposal that was environmentally sound from industry's perspective. The key to breaking the political gridlock was the use of a free market approach that gave

industry the greatest possible leeway in cutting pollution.¹⁵ An air permit program for all sources of emissions was not an essential part of the Bush Administrations core proposal.

By May 1989, the Bush Administration air legislation proposal was focused on three areas; acid rain, urban ozone, and hazardous pollutants.¹⁶ The permit provision was added after suggestion by an interagency group that a state permitting system similar to that used in water pollution control be added to control air emissions.¹⁷ Under the system envisioned, state governments would issue air permits based on "best engineering judgment."¹⁸

On June 12, 1989, President George Bush announced his administrations proposed legislation to amend the Clean Air Act. It contained three goals; to cut sulfur dioxide emissions that cause acid rain by almost half, to 10 million tons, reduce nitrogen oxide emissions by 2 million tons, both by year 2000, cut emissions that cause urban smog and ozone in half, and reduce emissions of air toxics. Industry was to be permitted flexibility in how it achieves these goals.¹⁹

One of the most significant initiatives in the President's proposal was the creation of marketable allowances creating a system to trade sulfur dioxide emissions.²⁰ The allowance trading proposal allowed maximum flexibility for utilities to achieve acid rain reductions. Attention devoted to this proposal dwarfed the other elements of the plan. President Bush claimed no pride of authorship, but believed his goal of achieving required reductions in the manner most efficient and least costly, had been met.²¹

A comprehensive federal operating permit system for sources of air pollution was *not* among the proposals identified by the President in his remarks nor included in the White House fact sheet released contemporaneously.²²

President Bush's first reference to a streamlined permit system was on July 21, 1989, in his remarks on transmitting the administration's seven-title proposed legislation to Amend the Clean Air Act to Congress²³

[W]e've proposed a streamlined permit system for all of the Clean Air Act's requirements to ensure that each source meets all applicable limits for air toxics, smog, and acid rain.

William Reilly, EPA Administrator, stated that new administrative procedures were required if goals of improved enforcement, expanded market opportunities and flexibility for state and local authorities were to be met.²⁴ The expressed goal of the air permit title, though not as "glamorous" as some of the other provisions, would be to put all the requirements of the different titles of the bill in one place.²⁵

Although the administration's proposal now contained an operating permit program, it lacked specific operational flexibility provisions to allow sources to make small increases of emissions, shift among different emission scenarios, or change emissions from those specified in the permit without proceeding through a lengthy permit modification procedure.

III. CLEAN AIR ACT LEGISLATION IN CONGRESS

A. The Bush Administration's Air Permit Proposal

The Administration's legislative proposal was introduced in the House on July 27, 1989 as H.R. 3030.²⁶ The operating permit provisions were included in Title IV which after some modification would later become Title V in the Act as enacted. A summary of the bill, inserted in the Congressional Record by Congressman Lent,²⁷ stated with respect to Title IV: Permits,

Title IV of the Clean Air Act Amendments of 1989, would build in existing State control of interstate air pollution control agencies programs by requiring those agencies to submit to the Administrator of EPA comprehensive programs for permitting stationary sources. This comprehensive program is patterned generally after the permitting program that now applies to point sources of water pollution under the Clean Water Act.

Section 402(a) of H.R. 3030, would make it unlawful for any person to operate a major source except in compliance with a permit issued by a permitting authority. Major sources were defined at section 401 of H.R. 3030 and included:²⁸

- any stationary source that has potential to emit 10 tons per year of any hazardous air pollutant, or 25 tpy of a combination of pollutants, under section 112,
- any stationary source or major emitting facility which emits 100 tpy of any air pollutant pursuant to section 302,
- any other source including an area source²⁹ required to have a permit under parts C or D of Title I or any other source designated by regulations: which could include sources as small as 10 tpy of volatile organic compounds in nonattainment areas designated extreme,
- sources under section 111, which established new source performance standards (NSPS) for new or modified stationary sources, including buildings, structure, facilities, or installation which emits any air pollutant.³⁰

The EPA Administrator was required to issue regulations within 12 months of the enactment of the permit title establishing the minimum elements of a permit program to be administered by any air pollution control agency.³¹ Minimum requirements of a program included, "[a]dequate procedures for public notice including offering an opportunity for public comment and a hearing, on any permit application,"³² and authority to make available to the public any permit application, compliance plan, permit or monitoring and compliance report.³³ A single permit could be issued for a facility with multiple sources.³⁴

The Bush proposal did not include an explicit requirement that state programs develop procedures for modifications as it did for applications. It did contain section 405(a), Transmission and Notice, which requires the permitting authority to transmit a copy of each application and permit modification to the EPA Administrator and contiguous states who could object to its issuance.³⁵ No time period was specified for permitting authority review. EPA had 90 days from receipt of the permit application to object to it.³⁶ Neither public notice nor comment was required for modifications under section 404(f) or by the procedures in section 405.

The only basis for a change to an operating permit was provided by section 404(f) of H.R. 3030, Less Stringent Requirement³⁷ - an anti-rollback provision - modeled after the provision in the CWA,³⁸ which prohibited a modified permit from containing a less stringent emission limitation, unless certain requirements were met. Increased emissions were allowed if they were consistent with a demonstration of attainment in the SIP and would not interfere with attainment and are offset by emission reductions from another permitted facility.³⁹ While section 404 was consistent with the Bush administration's desire to use the market system to regulate air emissions by allowing trading of emissions between sources, it was troublesome for industry because it did not allow internal netting to offset emissions increases, it made no distinction between large

and small emission increases, and required preparation of a lot of paperwork to modify a permit with resultant delay for regulatory review.⁴⁰

B. Through the Congressional Committees

1. In the House

The Report of the House Committee on Energy and Commerce on H.R. 3030,⁴¹ noted the administration did not provide an estimate of how many sources would be affected by the air permitting requirement.⁴² This significant omission suggests that the drafters of the administrations permit title did not envision the scope of the operating permit requirement.

The House Committee recognized stringency as a troublesome area of the permit title. States with permit programs would have to conform their programs to the requirements of the federal permit program but were not precluded from adopting additional consistent requirements.⁴³ To the extent state permit programs differed in stringency, advantages could be created to attract industry to a particular state. The Committee expected EPA to try to avoid allowing a situation to develop where states compete against one another by using the CAAA's stringency and to consider this concern when it issues regulations and in oversight of State or local programs.⁴⁴

Minor changes were made by the Committee on Energy and Commerce to the Bush administrations permit proposal in H.R. 3030. Section 402(b)(6) was modified to require EPA to provide:⁴⁵

adequate, streamlined and reasonable procedures for expeditiously determining when applications are complete, for processing applications for public comment and notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications.

This section indicates that its streamlined procedures apply to expeditious review of permit "actions", a distinctly different term from "modification" used in section 405 of H.R. 3030 which required notice to contiguous states and EPA. Was a permit

"modification" a form of a permit "action"? By stating that the expeditious review of permit actions also applied to initial applications and renewals, the Committee implied that it did not.⁴⁶

The anti-rollback provision, section 404(f) remained intact. The Committees' discussion of the section 404 focused the methods sources could use to meet the no less stringent requirements.⁴⁷ Section 404(f) could be met by showing that the modification sought is consistent with a demonstration of attainment or emissions increases are compensated by decreases at other facilities. The Committee did not discuss the size of the increase that would trigger a modification and application of the no less stringent criteria in section 404(f).

At this point H.R. 3030 still lacked minor permit adjustment and operational flexibility provisions.

2. In the Senate

Senator Max Baucus, Chairman of the Senate Environment and Public Works Subcommittee on Environmental Protection, introduced Senate Bill 1630, on September 14, 1989, which sought to improve urban air quality, and contained provisions relating to mobile sources, nonattainment areas and enforcement, but did not contain the operating permit provisions of the Bush administration proposal nor that of H.R. 3030. This bill was referred to the Committee on Environment and Public Works. The Bush administration proposal, introduced by Senator John Chafee on August 4, 1989, did not make it out of committee.⁴⁸ As reported on December 20, 1989 from the Committee of Environment and Public Works, Senate Bill 1630 contained seven titles including a Title V-Permits based on the President's Title IV air permit proposal.⁴⁹

Senate Report 101-288,⁵⁰ accompanied S.1630 out of committee. It is valuable for its discussion of the benefits of a permit system. Benefits of a permit system included clarifying source obligations by including them in an air permit, and eliminating delay incumbent in changing source obligations through SIP modifications by using permits and

placing a strict time limit on EPA permit reviews.⁵¹ The permit system would enable the public to determine the requirements to which the source is subject. It would facilitate emissions trading and close a gap in the in the pre 1990 Act which lacked an explicit requirement for sources of air pollution to obtain an operating permit, thereby making it consistent with other environmental laws, including the CWA,⁵² and the Resource Conservation and Recovery Act.⁵³

In its S. 1630 form, Title V-Permits, still contained a serious deficiency, it did not address the ability of a source to make small increases or changes in emissions without having to proceed through a formal change to the permit and meet the anti-rollback provisions.

Despite this shortcoming, the Report indicated that EPA should develop administrative mechanisms so that a source may in the course of normal operations, make minor changes in production methods or products without the need to apply for a modified permit with each change.⁵⁴ EPA could promulgate permit drafting guidance in the future, according to the Senate Report, allowing source requirements to be specified for existing and anticipated scenarios.⁵⁵ The legal basis for such action by EPA was not explicitly provided in S. 1630. This guidance would have run afoul of section 353(f)(2), S. 1630's version of the section 404(f) anti-rollback provision. With respect to minor permit modifications and operational flexibility, which were not yet included in S. 1630, the Senate Report offers little insight.

Concern over the scope of the anticipated air permit program was expressed in the minority views of the Senate Report. Permitting authorities might have to triple the staffs needed to administer the permit changes.⁵⁶ Business productivity would be hindered by the permit requirement as each time it wants to change a solvent, increase output to take advantage of production capability, or respond to consumer demand, it will have to obtain a permit revision.⁵⁷ "It seems quite clear that the bureaucracy responsible for processing

these permits will not be able to handle permit revision and issuance without putting the nation's industry in an operational straight jacket."⁵⁸

C. Senate Adds Operational Flexibility Requirement

Several amendments to S. 1630 were proposed on the Senate Floor. The Bacus-Chafee Amendment 1293 and the Nickles-Heflin-Dole amendments, 1373 and 1456 were noteworthy for their operational flexibility and permit modification provisions.

When passed by the Senate April 3, 1990, S. 1630 contained the operational flexibility provision from the Bacus-Chafee Amendment No. 1293. It stated:⁵⁹

The Administrator shall, by regulation, require that if a permit applicant identifies the composition of emissions under the reasonably anticipated operating conditions of the permitted facility, the permit shall set forth emission limitations, standards, and other requirements that would apply under all such reasonably anticipated operating conditions.

By inserting this language into S. 1630 the Senate established an express legal basis for the EPA to promulgate permit regulations providing for a source to shift emissions among various scenarios identified in the permit without having to obtain a permit modification. The EPA would be able to devise the guidelines referred to in Senate Report 101-228.⁶⁰ This provision would become known as the alternative scenario method of providing operational flexibility.

A second method of ensuring operational flexibility was added to S. 1630 by Amendment 1293, section 354(e)(2):⁶¹

The Administrator shall, by regulation, require that emission limitations contained in permits, as well as other permit terms, provide the owner or operator of a facility the flexibility to make changes in the operation of the facility that might shift permitted emissions from one source to another within the same facility, as authorized by a permit, without the necessity for a permit modification: Provided, That the owner or operator provides the Administrator and the permitting authority with advance written notice specifying the proposed changes and anticipated emissions effects of such changes not less than 30 days prior to making such changes...

This section created flexibility by use of internal emission trading or netting. Two limitations were evident. A proviso was added that prohibited changes which caused an increase in the rate of emissions allowed or total emissions allowed by such permit.⁶² Flexibility was limited by the 30 day notice a source was required to give the permitting authority before commencing the change.

Bacus-Chafee modified section 354, Notification to Administrator and Other States, requiring for the first time public notice and comment for permit modifications.⁶³ The anti-backsliding language of the Bush proposal was deleted. The requirement for public notice and comment for modifications may have been required because section 354 was changed to allow permit modifications that were contrary to provisions of the SIP with concurrence of the EPA Administrator.⁶⁴

The Nickles-Heflin-Dole (NHD) Amendment, No. 1373, was introduced at the behest of the Bush Administration as an alternative to Bacus-Chafee Amendment 1293.⁶⁵ Developed in conjunction with EPA and the Department of Justice, it was an attempt to revise the permit provisions in the Bush administrations proposed Clean Air Act legislation.⁶⁶ One goal was to provide "critical" operational flexibility to enable businesses to make routine changes in facilities, particularly small specialty chemical manufacturers, electronics, and aerospace firms.⁶⁷ Administration and industry officials feared the permit system, as proposed, would require companies to modify emission permits before making routine operational changes that are presently made without government oversight. The air permit proposal was understood to effect 50,000 small businesses alone.⁶⁸ Bacus-Chafee, it was feared, would delay permit modifications, resulting in lost business opportunity resulting in plant shutdowns.⁶⁹ Precisely which provisions caused this concern were not stated.

The amendment enjoyed the support of the U.S. Chamber of Commerce and the National Association of Manufacturers.⁷⁰ After it was defeated in a close vote, it was

reintroduced in slightly different form as Amendment No. 1456. In explaining the differences between this amendment and of Amendment 1293, Senator Nickles stated,

that we provide in our amendment some operational flexibility for companies so they can change some of the various compositions of their work product and make those changes. Unfortunately under Bacus-Chafee it cannot happen. So if a company [that] produces a wide variety of products needs to make some changes, they have to go file a permit application.⁷¹

In its attempt to provide operational flexibility, NDH proposed to modify section 354(e)(2) of Bacus-Chafee to provide a shorter notice period to permit authorities, seven days as opposed to 30, before shifting of permitted emissions from sources within the facility could be undertaken.⁷²

The NHD amendments contained a requirement at section 351(b)(6) for:

Adequate, streamlined and reasonable procedures for expeditiously determining when permit *applications* are complete, and for processing such applications for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications.⁷³

It contained an additional section, 351(b)(8), which explicitly required adequate and expeditious procedures for permit modification.⁷⁴ Bacus-Chafee did not contain this modification provision. Unlike section 354(a)(1)(A) of Bacus-Chafee,⁷⁵ which required proposed modifications to receive public comment in addition to comment by states and EPA, the NHD amendments did not explicitly require permit modifications undergo procedures for public comment or judicial review. The NHD amendments did not even provide for "judicial" review of permit applications. Instead review of permit actions, including applications, by an administrative law judge was anticipated.⁷⁶

A distinction was made in both Bacus-Chafee and the NHD amendments between permits that implemented (codifying) and did not change a material aspect of applicable

requirements in a SIP from those that did (modifying).⁷⁷ The codifying permit did not have to be forwarded to the EPA for review. Both Bacus-Chafee and the NHD amendments allowed modifications of SIPs or applicable requirements if the EPA Administrator agreed.⁷⁸

It is difficult to discern if Senate rejection of the NHD amendments constituted a rejection of its permitting modification procedures, or reflected dissatisfaction with other aspects of the amendments. Senate debate focused primarily on provisions related to citizen suits and the Gwaltney decision.⁷⁹ Environmentalists and the State And Territorial Air Pollution Program Administrators (STAPPA) opposed the amendments because of their provision prohibiting permitting agencies from revising a permit during its five year life unless it can be demonstrated that there is actual harm to public health.⁸⁰ The amendment was narrowly defeated, (49 yeas, neas 51).

As passed by the Senate, S. 1630 provided source flexibility by allowing use of a single permit for a facility with multiple sources, section 351(d), and incorporated the operational flexibility and permit modification language of Amendment 1293.

The word "revision" in what was to become sections 502(b)(6) and 502(b)(10) of S. 1630 and ultimately the Act, were added in the House without relevant debate by floor amendments.⁸¹

D. Operational Flexibility and Permit Modification in the Conference Committee

The conference committee formed to resolve the discrepancies between S. 1630 and H.R. 3030, produced Conference Report 101-952.⁸²

Regarding the permit program stringency issue, the committee report reflected the conferees understanding that a state may establish more stringent permitting requirements, consistent with Section 116 of the CAA,⁸³ but could not establish permit requirements that are inconsistent with the Act, including Title V-Permits.⁸⁴

The conference committee modified the operational flexibility section 354(e)(1),(2) in S. 1630, deleting section 354(e)(1), and moving section 354(e)(2) to become section 502(b)(10). State permit programs were now required to have:⁸⁵

Provisions to allow changes within a permitted facility (or one operating pursuant to section 503(d)) without requiring a permit revision, if the changes are not modifications under any provision of title I and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emission or in terms of total emissions), provided that the facility provides the Administrator and the permitting authority with written notification in advance of the proposed changes which shall be a minimum of 7 days, unless the permitting authority provides a different timeframe for emergencies.

The notice period to permitting authorities was reduced to seven days from the 30 in S. 1630. The conference committee used "modifications" in section 502(b)(10) with the meaning conferred in Title I. If the de minimis exception was applied to emissions from a source subject to the prevention of significant deterioration requirements imposed by section 160 of the Act, the source would be allowed to increase under Title I emissions of carbon monoxide by 100 tons per year, nitrous oxides and sulfur dioxide by 40 tpy, fluorides by three tpy, vinyl chloride by one tpy, without reaching the threshold that constituted a modification.⁸⁶

The Conference Report states that facilities will be authorized to make changes in operations without the necessity for a permit revision so long as:

- (i) the changes are not "modifications" under Title I of the Act,
- (ii) the changes will not result in emissions that exceed emissions allowable under the permit, and
- (iii) the facility provides EPA and the permitting authority seven days written notice in advance of the changes.⁸⁷

The Chafee-Bacus statement of Senate Managers section by section analysis indicates that larger changes would be allowed in areas with cleaner air as the definition of "modifications" changed with attainment status.⁸⁸ By enclosing "modification" with

quotations, the committee provides yet another indication that modification was used in section 502(b)(10) of the Act intending its Title I meaning.

Section 505(a) provided for notice to EPA and permitting authorities of permit applications, renewals and modifications.⁸⁹ Section 505(b) allowed objections to permits, which included modifications based on section 505(a), by any person based on objections raised in the public comment period. It is unlikely that these provisions were construed by the conference committee as a requirement for public notice and comment on small changes to permits. "The conference agreement requires each permitting authority to transmit to the EPA a copy of certain permit documents for review in connection with each permit application." In addition, permitting authorities were required to transmit each permit application and proposed permit to states within 50 miles of the source.⁹⁰ The use of modification in section 505(a), may be a remnant of the earlier provisions in S. 1603, section 354,⁹¹ and H.R. 3030, section 405,⁹² on transmission and notification to EPA and adjoining states, that would have allowed permit modifications to change SIP provisions.

Modification may have been used consistent with Congress' understanding of its Title I meaning in section 505(a). A source undergoing a "modification" would under Title I be required to undergo new source review or utilize the emission control measures applicable to a new source.⁹³ There is a certain logic then in treating "modifications" in the same manner as renewals or permit applications. Under this interpretation, increases of sulfur dioxide would be limited to the 40 ton per year de minimis threshold before state or EPA concurrence was necessary.⁹⁴ It is logical that increases which are already limited by regulation would not need to be subject to the same scrutiny as modifications. Absent geographic or atmospheric conditions that would make such review productive, it seems unlikely that an adjoining state or the EPA Administrator would desire to review every permit change that did not rise to the level of a "modification" under Title I.

Expeditious review of permit actions, including applications, renewals or revisions, was now required by section 502(b)(6). The committee did not provide a reason for the use of "revision" as opposed to "modification" in this section. Discussion of section 502(b)(6) focused on judicial review.⁹⁵

The deletion of section 404, the anti-rollback provision, indicates that Congress had dropped its aversions to changes in permits. This left unanswered the question of how small changes that increased emissions but did not constitute modifications were to be processed, either under section 505(b) procedures or the EPA devised procedures under section 502(b)(6). A literal interpretation of section 505(a) would encumber source flexibility with public notice, comment and procedural delay in obtaining changes to accommodate these small increases.

The House and Senate debates on the Act are not helpful in determining the size of the change required to trigger the permit revision process. Representative Oxley commented that many issues had been left to EPA discretion in implementing the Act, including the operational flexibility provision of section 502.⁹⁶

E. The President's Signing Statement

Although President Bush voiced pleasure in signing the Clean Air Act Amendments, for they contained all the essential features of his original proposal, he expressed serious concerns about the cost of the legislation. The President directed the EPA Administrator to implement the bill in the most cost effective manner possible. The the permit program would be phased in over time in a non disruptive manner.⁹⁷

IV. INITIATION OF THE RULEMAKING PROCESS

The rulemaking process is formally initiated by the creation of a rulemaking docket. EPA established, pursuant to CAA section 307(d)(2), rulemaking docket, A-90-33, for promulgation of the operating permit regulation.⁹⁸

Only an objection to a rule or procedure raised with specificity during the comment period may be raised during judicial review.⁹⁹ To preserve the opportunity for judicial review, industry, states, and environmentalists must identify all objections during the rulemaking process.¹⁰⁰ This accounts for the nearly 500 submissions to EPA during the comment period.¹⁰¹

Given the ambiguity surrounding the permit modification requirements in sections 502(b)(6), and 505 of the Act, and the express delegation of authority in section 502(b)(10), the EPA Administrator enjoys discretion and deference in developing the regulations to implement these sections under Chevron.¹⁰² Rep. Norman Lent co-sponsor of H.R. 3030 said of the Clean Air Act amendments, "It's no secret, as you read them, these amendments are full of ambiguities and generalities, many of them intentional, some unintentional."¹⁰³ If the Title V program was broader and more expensive than the White House preferred, the damage could be mitigated through use of discretion in the rulemaking process.

EPA had four objectives for the permit system, make the Act readily enforceable, gather information necessary to protect the environment, provide a clear emissions baseline to facilitate emissions trading, and encourage the states to raise fees necessary to support the permit program.¹⁰⁴ EPA makes no mention of providing operational flexibility to sources, despite the express provision appearing in the Act. It appeared to view the permit requirement exclusively as an enforcement tool despite the fact that the permit requirement was never thought of exclusively in those terms.

Section 502(b) of the Act tasked the EPA Administrator to promulgate regulations within 12 months of November 15, 1990, establishing the minimum elements of air

pollution permit programs to be administered by any state or local air pollution control agency.¹⁰⁵ EPAs operating permit regulations would not directly impact sources of air pollution, but would apply to states and local air pollution authorities, who would devise regulations to implement this federal permit program. Sources would obtain permits from the states who were required to incorporate the Act's enumerated elements. Required elements included:

- use of standard application forms, section 502(b)(1),¹⁰⁶
- monitoring and reporting requirements, section 502(b)(2),¹⁰⁷
- a fee of \$25 per ton of each regulated pollutant, or such other amount as the Administrator finds reasonable, section 502(b)(3),¹⁰⁸
- permits issued for a fixed term not to exceed five years, section 502(b)(5)(B),¹⁰⁹
- streamlined procedures for expeditiously determining when applications are complete, procedures for public notice, including offering an opportunity for public comment and a hearing, expeditious review of permit actions, including applications, renewals, or revisions and opportunity for judicial review in State court of the final permit action by the applicant, by any person who participated in the public comment process, section 502(b)(6),¹¹⁰ and,
- regulations to allow changes within a permitted facility without requiring a permit revision, 502(b)(10).

The first draft of the proposed operating permit regulation provided to Roundtable members,¹¹¹ and state and local air quality management districts was dated December 21, 1990. The importance of these early drafts cannot be overstated. States were on a tight schedule and required legislative and regulatory changes to their existing permit programs to comply with the EPA program by the statutory deadline of Nov. 15, 1993.¹¹²

V. APPLICABILITY ISSUES IN THE OPERATING PERMIT REGULATION

A. What Is A Major Source

One of the first issues EPA faced was how to calculate the emissions from a facility for purposes of determining whether it was a major source. The definition of "major source" was critical to determining which sources were required to obtain permits and which might be deferred. As defined by EPA in the December draft,¹¹³ a "major source" means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is any of the following:

- (1) A major source as defined in section 112 of the Act:
 - (a) For pollutants other than radionuclides, this means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant which has been listed pursuant to section 112(b) of the Act, or 25 tons per year or more of any combination of such hazardous air pollutants.
 - (b) Such lesser quantity as the Administrator may establish by rule.
- (2) A major stationary source as defined in section 302(j) of the Act. Any stationary source of air pollutants which directly emits or has the potential to emit, 100 tons per year or more of any air pollutant, as determined by the Administrator.

[Under subsection (a), fugitive emissions would not be used to calculate whether the source was major unless it belonged to one of the listed categories (2)(a). The list of categories included all other stationary source categories regulated under section 111 or section 112 of the Act.]

- (3) A major stationary source as defined in Part D of Title I of the Act:
 - (a) For ozone nonattainment areas, this is those sources with the potential to emit volatile organic compounds of 50 tons or more per year in areas classified as "serious," 25 tons or more per year in areas classified as severe, and 10 tons or more per year in areas classified as "extreme".
 - (b) For ozone transport regions, pursuant to section 184 of the Act, ... sources with potential to emit volatile organic compounds of 50 tons or more per year.

(c) For carbon monoxide nonattainment areas classified as "serious," this is those sources with the potential to emit 50 tons or more per year of carbon monoxide.

(d) For particulate matter (PM-10) nonattainment areas classified as "serious," ... sources with the potential to emit 70 tons per year.

This definition clearly established that smaller sources would be subject to the permitting scheme in nonattainment areas. These areas were generally regulated by SIP provisions designed to achieve compliance with NAAQS. Naturally states with developed permit systems would be concerned about the scope of the federal operating permit and its effect on their existing SIP programs. The question that remained was how stationary sources in contiguous areas would be aggregated. Would dissimilar sources be combined?

B. Deferral of Nonmajor Sources

In its December draft, EPA believed the permitting program must include:¹¹⁴

- Any major source as defined in draft section 70.2;
- Any source, including an area source subject to a standard or regulations promulgated under sections 111 or 112 of the Act;
- Any source subject to Title IV of the Act -- Acid Deposition control, including "affected sources,"
- Any source designated by the Administrator pursuant to this section. (This section was reserved for future use as the Administrator did not designate any such sources.)

Faced with the prospect of implementing a permit system that could require 350,000 sources to obtain permits,¹¹⁵ EPA sought to use its discretion to exempt nonmajor sources.¹¹⁶

The deferral, proposed in draft regulation 40 C.F.R. § 70.3, was limited in two respects.¹¹⁷ It did not automatically apply to sources that qualify as Part 70 sources based on emissions of a pollutant for which its area is classified nonattainment. A permitting authority would be required to make a showing that deferral will not adversely effect the ability of the state to meet its SIP obligations. Nonmajor sources that are subject to the new source performance standards (NSPS)¹¹⁸ or existing national emission

standards for hazardous air pollutants (NESHAP),¹¹⁹ would still be subject to those regulations. For sources that contribute to ozone in a state with a SIP that relies upon emission reductions from nonmajor sources to demonstrate attainment, states would have to make a showing that deferral was not adverse to meeting the SIP requirements.¹²⁰

The deferral was justified in the proposed preamble on the basis that it would lower the administrative burden on permitting agencies at a critical time, when state programs first become effective and are most vulnerable to overload.¹²¹ Major sources now included comparatively small sources, particularly under the NSPS of Title I, nonattainment provisions of Title I, and the NESHAPs.¹²² The permitting requirement would disproportionately impact small businesses who lacked legal and technical resources necessary to handle a new program. For these reasons, the EPA concluded that permitting such nonmajor sources would be unnecessarily burdensome on those sources.¹²³

The Office of Management and Budget (OMB) comments on the draft permit regulation reflect a concern that the permit program was overextending itself, it wanted, "... a narrower approach to source and pollutant applicability."¹²⁴ The EPA agreed with this assessment regarding source applicability. It proposed to aggregate sources based on their Standard Industrial Classification (SIC) codes.

C. The Proposed 40 C.F.R. Part 70

Consistent with its response to OMB, EPA added language to the definition of major source in proposed 40 C.F.R. § 70,¹²⁵ to utilize the Standard Industrial Classification Manual to aggregate sources. The language added,¹²⁶

A stationary source or group of stationary sources shall be considered as part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources belong to the same Major Group (i.e., which have all the same two digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplemental ...

ensured that sources would be combined based on two digit SIC codes.

The EPA offered states the opportunity to exempt nonmajor source categories from the permitting regulation.¹²⁷ However states would have to justify the exemption as in the initial draft.

D. Public Comment on the Proposed Rule

Industry comments generally supported EPAs intent to aggregate emission units at a facility based upon the two digit SIC code of the units. The use of a two digit SIC code would avoid the the possibility of considering two dissimilar sources as one source simply because of common ownership.¹²⁸ Precedent existed for their use in the prevention of significant deterioration rules.¹²⁹ Industry believed that basing the definition of a major source on all common owned or controlled pollutant emitting activities on contiguous or adjacent properties, allows a source to aggregate all emissions and use a bubble.¹³⁰ Some proposed that equipment used to support the main activity at the site should also be considered as part of the same major source regardless of the SIC code.¹³¹

One unique concern of the oil industry was that oil production and exploration often covers large contiguous properties, in remote locations. Industry representatives suggested that these operations be included in a general permit as strict interpretation of EPAs proposed SIC aggregation would subject these operations to permit requirements.¹³²

The waste management industry did not support the use of two digit SIC codes.¹³³ Waste facilities often support several distinct activities that are separately regulated despite the fact they share space on a single property. Four digit SIC codes would allow each activity at the site to have the option of obtaining its own part 70 operating permit.¹³⁴ This allows disparate business activities to respond more readily to changes in business conditions.

The California Air Pollution Control Officers Association, (CAPCOA) believed the major source definition could allow a, "... group of sources on the same property and under the same ownership to disaggregate sources for the purpose of becoming exempt under the proposed regulation."¹³⁵

The deferral of nonmajor sources received overwhelming support from industry and states. Some believed the deferral should be permanent unless the EPA determines that a specific nonmajor source category should be permitted.¹³⁶ Environmental organizations with few exceptions did not denounce the deferral of nonmajor sources.¹³⁷

The DoD recommended¹³⁸ that the definition of major source be adjusted to account for differences between the military and industry, by adding "or under common military control" and an exception to the SIC code for military installations.¹³⁹

E. EPA Response

Commenters overwhelmingly supported the five year deferral of nonmajor sources concluded EPA.¹⁴⁰ In response to comments on the deferral issue, EPA cited the statutory authority provided by section 502(a) and concluded that without the deferral compliance with permitting requirements would be impracticable, infeasible and unnecessarily burdensome on nonmajor source categories.

Its decision was supported on two grounds. The burden on the permitting authority and EPA in the initial stages of the permit program will make permitting nonmajor sources impracticable. The second, independent reason supporting deferral, according to EPA, was that the requirement to obtain a Title V air permit during the early stages of the program would be "unnecessarily burdensome" for nonmajor sources disproportionately affected by the administrative difficulties of the permitting authorities.¹⁴¹ EPA cited Alabama v. Costle, for the proposition that a deferral of the applicability of the Act provisions requires far less justification than an outright

exemption.¹⁴² States were free to accept the deferral or limit it to certain categories of nonmajor sources.¹⁴³

In its response to comments on the definition of major source, particularly the use of the two digit SIC code, EPA noted that many industry commenters supported its use.¹⁴⁴ The SIC is not a creation of EPA but of the Office of Management and Budget where it is used to standardize statistical data gathering and analysis for the nation's economy. The SIC classifies establishments by economic activity to assist in information collection and promote comparability in the presentation of statistical data.¹⁴⁵ If emission units at a source have the same two-digit SIC code they are part of the same industrial grouping, and subject to part 70.

Two digit codes are superior to use of three or four digit codes argued EPA. They are narrow enough to separate sets of activities into common sense groupings, yet broad enough to minimize the possibility of artificially dividing up the set of activities that does not constitute a plant into more than one group.¹⁴⁶ Aggregation by SIC code should be done in a manner consistent with established new source review (NSR) procedure, examples were provided.¹⁴⁷

To support its decision to use the two digit SIC, EPA relied on the major source definition in the CAA section 502(a), which defines major source as, "a stationary source (or group of stationary sources located within a contiguous area and under common control)" that is either a major source as defined in section 112, or as defined in section 302, or Part D of Title I. EPA emphasized consistency with its past NSR practice, where the regulations require all commonly owned or controlled pollutant emitting activities on contiguous or adjacent properties to obtain an operating permit if they are within the same major (two digit) SIC group.¹⁴⁸ Companies involved in oil exploration were relieved when EPA provided that emissions from oil and gas exploration or pipeline compressor pump or production well shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control.¹⁴⁹

Congress was aware of its practice of using SIC codes in determination of major sources. EPA cited the H.Rept.101-490, as evidence that Congress understood what the term major source meant, a group of sources within a two digit SIC code. It is the approach followed by EPA as a result of the Alabama Power litigation, said the Committee. It avoids the possibility that dissimilar sources like a power plant and an adjacent coal mine would be considered as one source. Congressional reliance upon a term for which there is a long standing agency interpretation is strong evidence, said EPA, that Congress considers this interpretation permissible, if not mandatory.¹⁵⁰ EPA would later abandon this rationale in its interpretation of the definition of modification in section 505 of the Act.

VI. OPERATIONAL FLEXIBILITY, PERMIT AMENDMENTS, AND MODIFICATIONS

A. What is a Modification

Industry desired to increase emissions from sources as long as the increases did not constitute a Title I modification without having to modify its air permit. It wanted to make these changes without delay from permitting authorities who would want time to review the proposed changes, and without public notice and comment. This would enable industry to quickly respond to market changes.¹⁵¹ The ability to make changes while avoiding scrutiny from regulators and public citizens would constitute an additional benefit.

Operational flexibility, in its section 502(b)(10) form, was an express requirement of state programs.¹⁵² It was, however, limited. The proposed flexible source operation provision, section 70.6(d) required permitting authorities to issue permits allowing changes to a permitted facility without a permit revision if the changes are not modifications under any provision of Title I and do not exceed the emissions allowable under the permit.¹⁵³ The definition of modification was critical to defining the scope of operational flexibility provision.

A modification under Title I of the Act is any physical change in, or change in the method of operation of a stationary source that results in emission of a new pollutant or increases existing emissions so as to trigger application of new source performance standards (NSPS) under section 111 of the Act¹⁵⁴ or new source review under in attainment or nonattainment areas under Parts C and D of Title I.¹⁵⁵ Changes in operating rates, number of hours of operation, some fuel changes or raw materials, ownership, routine maintenance, repair, or replacement are exempted from this definition of modification.¹⁵⁶ Increases in emissions of any hazardous air pollutant or emissions of a new pollutant by more than a de minimis amount would not constitute modifications if they can be offset by decreases in the quantity of emissions of another hazardous air pollutant from such source which is deemed more hazardous.¹⁵⁷ Modification exceptions were also provided in NSPS and NESHAPs are similar to the preconstruction review exemptions in Parts C and D.¹⁵⁸

Thus changes that increased emissions by de minimis amounts that were not modifications under Title I,¹⁵⁹ could qualify for the operation flexibility provision in section 502(b)(10).

EPA, however, proposed to allow state regulations to contain criteria for defining which forms of activities constitute modifications under Title I.¹⁶⁰ States, per the EPA, may have more expansive definitions of modifications than required under federal law for the purposes of imposing Best Available Control Technology (BACT)¹⁶¹ or other new source requirements. EPA encouraged states to examine whether they wished to use a state or federal definition of modification to require re-permitting.

Industry would be adversely affected by such a decision, since states could narrow the scope of flexibility by decreasing the threshold of a Title I modification. A proposed change that would qualify under Title I as a modification requires permit revision and would not be processed under section 502(b)(10) provisions. For industries operating in more than one state, this could mean several different sets of rules. While this was the

existing situation under the SIPs, EPA could use the rulemaking to promote uniformity. This was never listed as one of EPA's goals or objectives however.

The state, could according to EPA, rely on federal definitions of modifications under Title I while retaining its own definition for imposing new source requirements.¹⁶² This could trigger a requirement for dual permits which both state and industry desired to avoid.

B. Permit Amendments and Modifications

EPA's December 1990 draft, section 70.2, distinguished between categories of permit changes, dividing them into amendments and modifications.

A permit "amendment" was considered a revision to a permit sufficiently minor in nature so that it could be processed informally, without public participation.¹⁶³ It was further defined at proposed 40 C.F.R. section 70.7(e), as a minor change in the permit that does not substantially affect the source's operation or emissions, or change any significant regulatory requirement.¹⁶⁴

Two types of changes could be treated as permit "amendments." The first included those "intrinsically of slight significance" to air quality management, including source changes, change in ownership, and changes in obligations involving less than 30 days change in compliance schedule.¹⁶⁵ These administrative type changes and could be made without formally reissuing the permit.¹⁶⁶

A second type of amendment could involve significant aspects of source operation, if they had already been subject to source specific scrutiny including public participation.¹⁶⁷ This provision was designed to include shifts between different operating scenarios previously identified in the permit.¹⁶⁸ It made no provision for changes not provided in advance in the permit that do not rise to the level of modifications under Title I of the Act.

A permit "modification" as defined in part 70.2 was a revision to a permit, as provided in section 70.7, of sufficient importance to merit application for the changed portions, of the same administrative procedures as for permit issuance. All permit revisions that were not amendments were to be reviewed as modifications.¹⁶⁹ Excluded from this definition were changes covered by the preconstruction review process which were not considered modifications.

EPAs early thinking equated changes that were not provided for in the operational flexibility provisions as modifications. Examples of modifications, generally more substantive changes to conditions in the permit than those of an administrative nature proposed as amendments, included source plans to make substantial alterations to a facility, changes to activities beyond the original permit, or initiation of new activities which would be subject to regulatory requirements other than those originally covered in the permit.¹⁷⁰

Modifications required the permittee use the same procedures as for initial permit issuance, including EPA review and the opportunity for public comment and hearing.

C. Public Participation Requirement

The Act did not specify the size of a change that triggers requirements for public participation. Public notice and comment is provided in two places. First, in section 502(b)(6) which states:¹⁷¹

Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of the action under applicable law.

In the December draft, EPA read that part of the clause providing for public comment and a hearing conjunctively with the provision providing for expeditious review of permit actions, including revisions, and an opportunity for judicial review. The examination of legislative history revealed that the elements in this section developed separately as a result of different amendments. The definition of revision was never specified. The EPA's broad reading of this section was not favorable to industry. By equating "revisions" with "modifications" in section 505(a) of the Act, EPA triggered the public comment process to permit changes. This created an issue as to what level of public comment and review would be given to increases not amounting to modifications.

The public participation process as devised by EPA in section 70.7(h)¹⁷² required states to provide for public hearings, if requested, on the permit applications, renewals, modifications and reopening, with 30 days notice to the public by prominent advertisement, availability of the record including information submitted by the applicant and of the permitting authority's analysis of the proposed action, and notification to the affected State air permit authorities and the EPA Administrator through the Regional EPA Offices.¹⁷³

From these provisions it is readily apparent why it was in industry's interest to have proposed 40 C.F.R. § 70.6 construed as broadly as possible by the EPA and required in state permitting programs. Use of section 70.6(d) would preclude application of the onerous public notice and comment procedures. For industry the key to flexibility would become what procedures would apply to increases that are not modifications and how the prohibition of emission increases in section 502(b)(10) would be treated.

D. Permits to Ensure Flexibility

To implement source flexibility, EPA suggested that states use three types of permits to provide a source with reasonable flexibility and meet the minimum permit requirements.¹⁷⁴ Requirements that permits had to meet included: precisely defining the range of operational parameters allowed by the permit; evaluating and assuring compliance under each operating scenario with all requirements of the Act, including identification of all applicable limitations, standards and requirements that apply to each emissions unit, so as to ensure enforceability under each scenario, not allow changes that constitute modifications, reconstructions or changes in methods of operation that subject the source to review under other programs; and not allow operational changes that increase either the rate of emissions or total emissions allowed under the permit.¹⁷⁵

The first type of permit that complied with these requirements was the permit in alternative.¹⁷⁶ This permit could list the pollutants and control requirements for the anticipated operating scenarios. The permit for a chemical batch processing facility could allow for various configurations and operating practices that the facility planned to use. This would eliminate the need for obtaining additional approval when the changes are made.

A second permit envisioned was permit by classes of chemicals.¹⁷⁷ State programs could provide that groups of chemicals can be treated interchangeably for certain purposes under this permit. One state reported to the EPA that it uses this approach in addressing the needs for operational flexibility in permitting extensive tank farms providing contract storage of chemical and petroleum products. Control requirements were based on five classes of chemicals, allowing the facility freedom to store any chemical in any tank with the required level of control.

The permit "in anticipation of the most restrictive case" was the last permit type proposed by EPA.¹⁷⁸ This permit can be envisioned as the envelope permit. It included the worst case emission scenario (the potential maximum emissions of the facility), or

specific controls or other limitations, including capacity limitation, in the permit. An unintended consequence of this permit is that since sources are required to pay permit fees based upon emissions potential, a source pays higher fees to obtain flexibility than would be warranted based on actual emissions. Large corporations are likely to use this permit as they can afford to pay more to obtain the higher limits. A disadvantage of this permit was that it created a gap between actual emissions and emissions as reflected in the permit. This gap would need, according to the EPA, to be accounted for to show attainment and maintenance of the NAAQS.¹⁷⁹

E. Roundtable Feedback on the EPA Draft

States raised stringency concerns. Where state and local permitting agencies have more stringent requirements than those required by federal law, states wanted to know if these provisions will be enforceable in the federal permit or would a separate second permit need to be issued? States did not want to issue a second state permit.¹⁸⁰

Texas believed that it issued more stringent state permits than those required by the federal preconstruction review in Part C and D of Title I of the Act. It wanted the option to use more stringent state NSR (for emission increases not triggering federal NSR and that would be allowed without revision under section 502(b)(10)) to require all physical changes, or changes in the method of operation, be authorized by the state before the source commenced the change.¹⁸¹ It would then employ a method with minimum administrative delay such as an amendment to the operating permit, issuance of a general permit or use of state exemptions, to meet flexibility requirements. Theoretically this proposal could help industry if EPA allowed industry to use the administrative permit amendment procedure in the operating permit regulation to incorporate changes made under state NSR.

Another state was concerned that proposed 40 C.F.R. § 70.6(d)(1), Flexible Source Operation:

The permitting authority shall issue permits which allow changes to a permitted facility without requiring a permit revision if those changes are not modifications under any provision of Title I of the Act and do not exceed the emissions allowable under the permit

used the word "shall" in the first line.¹⁸² It suggested use of "may" instead but provided no authority for this suggestion. This provision was taken almost verbatim from the language at section 502(b)(10) which similarly employed "shall."¹⁸³ The state objected to the use of "shall" in proposed section 70.7(d) Permit Modifications, "... the State program shall contain provisions that allow for changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of Title I ..." Substitution of "shall" with "may," and clarification of modifications under Title I were sought. This is indicative of provincial viewpoints advocated by states.

New Jersey sought to narrow the basis for which a public hearing could be required, from "on any reasonable basis"¹⁸⁴ to instances where a request "raises significant air quality issues for which a hearing would contribute to the permitting process."¹⁸⁵ This would assist industry to avoid this aspect of the public participation process, and coincidentally the State to avoid hearings based on insignificant issues.

States were not clear on what type of changes constituted modifications and amendments.¹⁸⁶ The modification definition, a revision of sufficient importance, did not define "sufficient importance." Nor were definitions of "substantial", "scope of original permit" or "new activities" provided by EPA in the draft.

Industry objected to EPAs encouraging states to adopt different definitions of "modifications" than set forth in the Act. It urged EPA to encourage states to minimize the imposition of confusing and conflicting standards.¹⁸⁷

The National Environmental Development Association (NEDA) was disappointed with the draft regulations.¹⁸⁸ Its dissatisfaction was grounded in a "lack of resolve" by EPA to assure that state permit programs are streamlined. The draft implies EPA

sympathy with states on resolution of even more burdensome issues including minimization of the need for permit modifications prior to routine operational changes. EPA will have to rework the proposal to give industry more flexibility in meeting requirements of the law.¹⁸⁹

OMB urged Federal enforceability of extra state requirements be limited, EPA agreed. It did not believe the Act allowed states to preclude certain protections otherwise available to sources, e.g. operational flexibility.¹⁹⁰ EPA agreed.¹⁹¹ EPA should take comment on potential exemptions for de minimis emissions. EPA had previously dropped such a provision on the advice of Donald Elliott, EPA General Counsel. Its response to OMB indicated that it may have to revisit this issue.¹⁹²

VII. EPAs May 1991 Operating Permit Proposal

A. Implementing Operational Flexibility

Ensuring environmental protection was the paramount goal¹⁹³ of EPAs proposed Title V operating permit regulation, 40 C.F.R. § 70.¹⁹⁴ Other principles included: minimizing small business concerns through use of cost-effective permitting techniques, such as general permits, promoting pollution prevention, establishing certainty for permitted sources (A Title V permit should articulate a clear road map of source obligations to inspire confidence in the system), and allowing flexibility in state programs and source permits.¹⁹⁵ These goals are indicative of a permit program with an emphasis on enforcement, not flexibility.

EPA attempted to soothe state stringency concerns¹⁹⁶ with additional language in the preamble:¹⁹⁷

Except as necessary to ensure national consistency to support the market-based, acid rain allowance trading system, requirements for Title V programs are intended to be flexible enough to allow States a reasonable range of options in designing their State programs for EPA approval.

Proposed 40 C.F.R. § 70.6(d)(1), however, stated that the permitting authority shall issue permits that allow changes to a source without requiring a permit revision.¹⁹⁸ EPA would await public comment before deciding the stringency issue.

Precatory stringency language aside, the proposal offered industry a variety of methods to obtain flexibility. First, EPA offered up a permit philosophy that was sure to please industry. The most important source of flexibility is the general principle that emissions or other practices not specifically prohibited by a permit are allowed if otherwise legal under the SIP or federal or State law. Air permits summarize existing restrictions, "...the nature of a permit is to allow anything that it does not expressly prohibit."¹⁹⁹ This expression of philosophy would provoke bitter disagreement in the public comment period.²⁰⁰

EPA defined and established minimum procedures for four classes of emissions changes at sources. Flexibility in its broadest sense, (not restricted to operational flexibility under section 502(b)(10)) was implemented in the proposed permit regulation in two places, proposed 40 C.F.R. § 70.6(d), Flexible Source Operation, and § 70.7, Permit Issuance, Renewal, Reopenings, Operational Flexibility and Revisions.²⁰¹

B. Changes That Do Not Require Prior Revision to the Permit

This category of changes included those that do not run afoul of the terms of a permit. Such changes can be made without seeking any revision to the permit terms. It became known as the off-permit change or inherent flexibility change.²⁰²

Changes that were anticipated in the permit would not require permit changes before being implemented by a source. EPA concluded that when section 502(b)(10) speaks of changes that do not result in exceedances of the emissions allowable under the permit, this means any change that does not violate an express prohibition in the permit is allowed.²⁰³ Industry would be free to alter its production processes in ways that alter production and increase emissions unless some term of the permit or other provision of

law prohibits the change.²⁰⁴ States were required to issue permits that complied with section 502(b)(10). EPA proposed use of the same three types of permits in the preamble as it had in the December draft; permit in alternative, by classes of chemicals, and in anticipation of the most restrictive case (worst case scenario).²⁰⁵ Permits were required to identify reasonably anticipated operating scenarios.²⁰⁶ No permit revision was required for shifts between anticipated scenarios.

In its flexible permit design discussion, EPA proposed a policy for incorporating flexibility that is consistent with existing state permitting processes.²⁰⁷ This would cause controversy because in so doing EPA missed an opportunity to establish uniform national requirements. EPA added that the relief provided by operational flexibility is limited in several ways, allowing sources flexibility is a way of meeting the applicable requirements, not avoiding them, limits must be enforceable, alternative limits can be issued only to the extent they are allowed by the underlying applicable requirements.²⁰⁸ Finally the degree of flexibility may vary with circumstances specific to the source or pollutant.

EPA used virtually the same language in this discussion on limitations of operational flexibility as it had in its December 21, 1990 draft.²⁰⁹ Industry's inability to make inroads on the stringency issue, virtually guaranteed that it would seek additional venues and forums for its complaints.

Another source of potential flexibility to industry was added to proposed 40 C.F.R. § 70.6(d)(2) which now provided:²¹⁰

If a part 70 source wishes to make a change that would increase any emission above a level allowed in the permit, and such change is not a modification under any provision of title I of the Act and would not be prohibited by any applicable requirement under the Act, then the source shall be required to revise its permit pursuant to procedures established by the State. Such procedures *may* provide for maximum operating flexibility, provided they meet the requirements set forth under Section 70.7(f).

While EPA itself did not provide flexibility to sources to make changes that increase emissions above the permit, not constituting a Title I modification, it did the next best

thing, it allowed states to provide this flexibility in their regulations. From the state perspective this had the effect of fostering competition to attract industry.

C. Minor Permit Amendments

Minor permit amendments were defined negatively, as changes in facilities that result in emissions above what is allowed in the permit but do not rise to the level of "modifications" under title I of the Act.²¹¹ To understand what a minor amendment is, one must understand what it is not; a "modification." EPA explained "modifications" in footnote 6 of the preamble.²¹² While the different types of "modifications" under various provisions of the Act were defined, no definition of minor amendment was provided.

EPA noted that CAA section 502(b)(6) did not mandate specific procedures to be used for making revisions to permits. Section 505 did not state which type of permit modifications must undergo EPA review. For source changes that result in emissions increases that do not amount to modifications under Title I, EPA proposed an accelerated, "streamlined" and "expeditious" review, employing a seven day notice requirement to the permitting authority before implantation.

Proposed 40 C.F.R. § 70.7(f) Minor Permit Amendment-Applicability allowed permitting authorities to treat any proposed revision to a part 70 permit as a minor permit amendment if the proposed revision did not constitute a modification under Title I of the Act and complied with all applicable requirements relevant to the source.²¹³ Notification needed to be given at least 7 calendar days before making the proposed change. Changes in emissions, requirements that became applicable as a result of the change, and the revised permit language under which the source proposed to operate, had to be described.²¹⁴

EPA, concerned about stringency, qualified this provision in several ways. First, states were not required to include it in their permit programs. "As a matter of policy"

states "should be" encouraged to implement expedited review procedures for these type of changes. States could have more expansive definitions of "modification" than required under federal law.²¹⁵ EPA, in footnote six, encouraged states to examine whether they wish to use state or Federal definitions of modification under Title I to trigger permitting under Title V.

The EPA straddled the difficult issue of whether an increase that does not amount to a modification can utilize the operational flexibility provision, namely implement change after limited notice, and left the decision to the states. Leaving this decision to the states was contrary to Congress' expressed desire that EPA take care to draft regulations that do not facilitate states drafting permit rules to lure business from one another.²¹⁶ Nor did it promote certainty for perspective permittees engaged in interstate commerce.

Given the de minimis exceptions to modifications already existing in law and regulations implementing the Act, one might have expected EPA to focus discussion on de minimis changes in a discussion of minor permit amendments.

D. Administrative Permit Amendments

Administrative permit amendments included correction of typographical errors, changes in address, and ownership.²¹⁷ A significant addition to their use was made by using the administrative permit amendment procedure to incorporate requirements from preconstruction review permits or exemptions authorized under NSR in an applicable implementation plan. As justification, EPA asserted, that the section 502(b)(6) permit modification procedure would be redundant after the change had proceeded through the state NSR process.²¹⁸

The changes made pursuant to these procedures could simply be incorporated in the permit. They were made without advance notice to the permitting authority nor the procedural requirements applicable to a permit modification. Environmental groups would object to this because the state NSR procedures offered them less of an opportunity

to challenge proposed changes, and the administrative permit amendment procedure did not provide them with public notice and comment opportunities.

Evidence of internal inconsistency at EPA is evidenced by the contradiction between EPA's language in the preamble and language in proposed 40 C.F.R. § 70.7(e)²¹⁹ which states an administrative permit amendment, "*shall* be made by the permitting authority ..." EPA retreats from this mandatory tone in the preamble, stating that these changes can be handled as administrative permit amendments at the discretion of the permitting authority.²²⁰

The decision to allow administrative changes using expeditious procedures, excepting the proposal to allow the NSR changes, does not appear to have been a difficult decision since these changes by definition have little or no effect on the environment.

E. Permit Modification

The third type of permit revision was the permit modification under proposed 40 C.F.R. § 70.7(d).²²¹ A permit modification included any proposed revision to reflect a change at the source that would constitute a modification under any provision of Title I, except as provided in proposed 40 C.F.R. § 70.2(c)(5)[Administrative permit amendment that incorporates into the Part 70 permit requirements from preconstruction review permits]. Before a modification to a permit could be issued, the proposed changes would be reviewed by the permit authority, submitted to the public and EPA for comment.²²² Only the material associated with the actual modification needed to be exposed to review and comment.

F. Public Comment

1. Environmental Organizations

Environmental organizations condemned the EPA proposals to implement flexibility as being inconsistent with enforcement. The minor permit modification procedure was criticized for not providing for public notice and comment of changes.

EPA violated its responsibility in CAA section 502(b)(2) to promulgate regulations establishing the minimum monitoring and reporting elements of a permit program, by leaving selection of monitoring techniques to the states.²²³ As authority, one organization cited Congress' expressed desire for EPA to develop regulations that discouraged competition between the states to lure business.²²⁴

The Natural Resources Defense Counsel (NRDC)²²⁵ took the offensive stating, "A troika of provisions -- "operational flexibility," "minor permit amendments," and an "enforcement shield" -- would create a Potemkin Permit Program."²²⁶ NRDC considered the EPA's approach "illegal, undemocratic, and fundamentally fraudulent as well as atrocious public policy."²²⁷

Congress, in CAA section 502(b)(10), asserted NRDC, restricted changes without triggering permit revision procedures (public notice and comment) to those that do not exceed the emissions allowable under the permit. It cannot be construed to allow changes to permit terms that are necessary to enforce limitations on emissions from units covered by the permit. Construing section 502(b)(10) to allow unilateral changes in emission limitations and associated requirements is incompatible with Title V enforceability requirements. Any claim that the proposed seven day period afforded for state objection to the change and preserves permit enforceability was "a joke."

A permit that expressed allowable emissions as an undifferentiated sum that might be released from units would not be enforceable. By allowing internal pooling (netting), EPA would let a source increase emissions from each unit into the pool, then create a different set of limitations that the source would argue did not result in an increase.

NRDC was attacking the use of a "bubble," a line of argument rejected by the Supreme Court in Chevron, by arguing that its use violates the requirement to have enforceable permits. Other organizations feared that a source could notify the permitting authority that it intends to change operations (with increased emissions) requiring the permitting authority to update the permit using administrative procedures, which would not allow for public notice and comment.²²⁸

NRDC dismissed industry arguments that it was unable to anticipate all operating scenarios five years in advance in the permit application, as unsupported or misplaced. Sufficient operational flexibility was provided to sources through use of the reasonably anticipated operating scenarios.²²⁹

Environmental organizations were even more disturbed by the minor permit amendment procedures in proposed 40 C.F.R. § 70.7(f) that allowed sources to increase emissions without public notice and comment, provided a Title I modification was not triggered. "Streamlined" and "expeditious" procedures they believed must also include public notice, including an opportunity for public comment and a hearing, as well as an opportunity for judicial review.²³⁰

NRDC thought the minor permit amendment procedure wholly unauthorized by the Act. The legal basis for the illegality argument was best articulated by NRDC. Section 502(b)(6) of the Act requires "adequate, streamlined, and reasonable procedures" covering four categories of activities relating to permit actions:

- procedures for determining when applications are complete,
- procedures for processing applications,
- procedures for public notice, including offering an opportunity for public comment and a hearing;
- and procedures for expeditious review of permit actions, including an opportunity for judicial review in state court of the final permit action by the applicant, any person who participated in the public comment process,

and any other person who could obtain judicial review of that action under applicable law.

EPA had interpreted section 502(b)(6) as not establishing clear requirements for public participation or permitting authority review of permit revisions. It was clear from the language, according to NRDC, nothing in it *suggests* (emphasis added) that public notice, opportunity for comment, agency review, and opportunity for judicial review may be dispensed with for permit revisions.²³¹ All of the above provisions were required for permit actions and permit actions are expressly defined to include permit revisions. It was not reasonable to believe that Congress would condition judicial review on participation in a process that EPA was given discretion to eliminate. NRDC cited the anti-rollback provisions in S.1630, section 353(f)(2) and H.R. 3030, section 404(f) as evidence that Congress considered allowing permits to be easily modified or reissued with less stringent emission limits, and rejected that notion.²³²

This comment is a distortion of the legislative history. The elimination of the stringent anti-rollback provisions, that made no provisions for small increases in emissions without securing a permit modification, at the same time the operational flexibility provision was added, suggests the opposite conclusion.

2. Industry Comments

Virtually every comment from industry defended the minor permit modification procedure, cited a need for operational flexibility, and supported EPA's permit philosophy.²³³ Concern regarding the scope of the permit program and EPA's failure to require minor permit modifications as an element of state program was also expressed.

Operational flexibility, industry noted, is not a simple function of a particular provision of the Act or regulations, but the result of interplay among a variety of provisions, noted industry. These provisions include those that require affirmative approval of changes, giving procedural rights to parties other than the permitting agency and source (EPA, contiguous states, and the general public) that lengthens the time

needed to approve changes, increases uncertainty, and precludes the permitting authority from waiving requirements.²³⁴

A spirited defense of operational flexibility, proposed 40 C.F.R. §70.6(d) and the minor permit amendment provisions, § 70.7, based upon the Chevron decision, was mounted.²³⁵ The linchpin of the minor permit amendment defense was that the Act was silent on the procedures required for production changes that will increase emissions over levels specified in the permit. In light of Congress' silence on how EPA should handle these types of permit revisions, EPA possessed the authority based on the Chevron decision to fill gaps in the law. Since the statute did not speak to the exact procedures to be used in situations not addressed by section 502(b)(10), and section 502(b)(6) does not prescribe a particular procedure, the Court would be left to decide whether the Agency's interpretation is a reasonable one.

The administrative record is replete with industry comment citing operational flexibility and minor permit amendments as vital to sustaining the ability to operate competitively. Industry provided examples of how these provisions would help it.²³⁶ Delay in obtaining approval for changes in operations was cited as a serious concern, potentially with effects upon product delivery schedules.²³⁷ States should not have discretion to adopt the streamlined permit amendment procedures in this situation, their use should be mandatory.²³⁸

This analysis was a double-edged sword. It could be used to support the EPA Administrator's discretion to define even more stringent procedures providing for additional public comment and regulatory review.²³⁹

Industry approved of permits that allowed anticipated operating scenarios to be written as envelopes so that anticipated changes are included.²⁴⁰ In response to the argument that pooling of emissions was inconsistent with enforcement in Title V of the Act, industry argued that the arguments of advocates of restricting changes under section 502(b)(10) to anticipated operating scenarios in a permit, or increases in a specific piece of

equipment up to the allowable limit for each piece, on the grounds that to do otherwise would violate the enforceability requirements of Title V, are "unaccompanied by thoughtful legal rational."²⁴¹ These arguments neglect the procedures provided for notification of changes or permit revisions. Seven days notice describing changes in emissions and any requirements that would become applicable as a result of such changes is required by 70.6(d)(3)(ii). The permit would then be formally reviewed and administratively revised according to procedures in section 70.7(e). EPA, despite the outbursts, has clearly articulated a basis on which to base its interpretation of the statutory provisions at sections 502(b)(10) and 502(b)(6).

Large facilities outlined difficulties they would have using the alternate scenarios or worst case permitting techniques to achieve flexibility. Large refineries have thousands of emission points.²⁴² It would be impossible to list all the operating scenarios in the permit application during the application process as required. Technological improvements can not be anticipated and there are an enormous number of process changes. Use of de minimis emissions levels would alleviate these problems. Increases under the threshold would be exempted from the permit amendment process.

EPA has authority under CAA section 111 to interpret and recognize the existence of de minimis changes.²⁴³ It could allow a permit revision procedure less burdensome than those for initial permit issuance. A proposal that does not exceed permit levels and is not a modification under any Title I provision does not require a permit revision and may be processed by notification seven days before the change.

Industry rejected claims that state permit programs, pursuant to section 116 of the Act, can omit operational flexibility provisions by claiming their programs are more stringent than the federal program.²⁴⁴ The law, according to industry, requires states to establish criteria and procedures for determining the completeness of permit applications, section 502(b)(6), to give priority to new sources, section 503(c), to allow an application shield, section 503(d) and to establish a program to assist small sources, extend trade

secrets protection. States should not be able to omit these provisions by claiming their program more stringent. The language in section 506(a), which provides that nothing in the permit title shall prevent a state, or interstate permitting authority from establishing additional permitting requirements not inconsistent with the Act, was drafted after section 116, and therefore qualifies it.²⁴⁵

Consequently, EPA should only approve state programs that provide for an internal bubble under section 502(b)(10), for administrative permit amendments and minor modifications under section 502(b)(6).²⁴⁶ The seven day minor permit amendment provision of section 70.7(f) should be mandatory for state permit programs. Emissions trading should be allowed to offset increases in production at a facility.

Industry responded to assertions that the seven day waiting period for revisions and minor permit adjustments were inadequate periods within which to accomplish reviews. The waiting period should not be seen as an opportunity for review of the change, it is intended to give time for the paperwork to be in place as of the date the facility change prompting the notice is executed. The seven day delay is to provide time for filing the change notice in at least three places (EPA, the permitting agency and the facility).²⁴⁷

EPA should try to establish a degree of consistency across the nation, creating greater efficiency. It should use the opportunity provided in drafting the permit regulations to address this issue of stringency v. consistency.²⁴⁸

Some industries sought an exemption for research and development laboratories.²⁴⁹ Section 70.2(r) defined "major sources" as including all emitting units within the facility in the scope of the permit. Laboratory hoods that vent fumes are therefore included in the major source determination. Laboratory processes, however, change almost daily. The EPA should develop de minimis exemptions from the permitting requirements because emissions from laboratory hoods are insignificant in comparison to other major sources. In addition to a reasonable cutoff, there should be a

de minimis exemption for ancillary operations that occur at many facilities. These would include drum cleaning operations, ventilation systems, ash handling systems, waste water sludge filtering.

Technical clarification of the EPA proposal was sought as well. The Clean Air Implementation Project (CAIP)²⁵⁰ requested that EPA clarify what constitutes a modification under Title I. Footnote six was particularly confusing.²⁵¹ The footnote does not make a definitive statement about what constitutes a Title I modification. EPA should provide a straight forward statement delineating the types of Title I modifications that are subject to permit modification requirements.

The procedures for administrative permit amendments needed clarification.²⁵² Sections 70.2(c) and 70.7(e) establish an appropriate mechanism for making various permit changes that are either routine in nature or have already been subjected to intense scrutiny pursuant to the new source review permitting requirements. These changes should take effect immediately upon the permitting authority's receipt of notification of the proposed change.

The Motor Vehicle Manufacturer Association (MVMA),²⁵³ noted that the three domestic automakers had lost a collective four billion dollars in the last quarter of 1990 and first quarter of 1991. It reminded EPA that the fundamental goals of the Act at section 101(b)(1) included promoting the nations productive capacity as well as environmental protection. MVMA defended OMBs involvement in the development of the regulations, ensuring considerations of economic impact of EPA rules was not incompatible with other government policies. It cited Justice Stevens comments in Chevron,²⁵⁴

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices - resolving the competing interests which Congress itself either inadvertently did not resolve, or

intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Industry did not focus on the permit modification procedure in its comments except to say that allowing 18 months for a state permitting authority to approve a permit was too long.

3. The Office of the Vice President

The Office of the Vice President (OVP) comments on an April 1991 draft EPA permit regulation reveal that EPA was considering use of de minimis thresholds to define minor permit amendments.²⁵⁵ OVP objected to the thresholds used. They provided for increases in emissions allowed in the permit by not more than the least amount of ten tons per year, or 40 percent of the applicable de minimis level established pursuant to section 112(g)(1) or any more restrictive criteria established by the Administrator.

The OVP proposed instead to allow states to devise procedures for permit changes that would increase emissions above a level defined in a permit, if such increases were not prohibited by any applicable requirement under the Act. Such procedures may provide for maximum operating flexibility provided they meet the minimum requirements provided for administrative permit amendments section. Neither notification nor permit revision would be required for changes allowed for by the permit or that are not regulated or prohibited under the permit. This proposal eliminated the seven days notice requirement required before making such a change.

4. The Regulators and Regulatory Interest Groups:

Several common themes echo through the state and local regulators comments to EPAs proposed operating permit rule. The states believed the regulations preempted their authority to have stricter, more stringent requirements than the EPA minimums. States should not be prohibited from developing permit programs that do not include operational flexibility.²⁵⁶ States should be able to set longer notice times than those established in the

federal scheme.²⁵⁷ As an example, the notice requirement in section 70.6(d)(3)(ii) that allowed a source to increase emissions without a permit revision if seven days notice was given, was too short a time period for state review. States cited section 116 of the Act as authority to adopt more stringent requirements than those required by federal law. EPA was departing from its longstanding practice of allowing states and local agencies to adopt more stringent programs.²⁵⁸

States disagreed with EPA's permit philosophy.²⁵⁹ Historically, state permitting forbid activities that were not expressly allowed in permits. All actions that have the potential to increase emissions, including chemical substitutions, should require permitting authority approval.²⁶⁰ The philosophy's result would be extremely detailed permits containing provisions which may never be used.²⁶¹ Regarding EPA's espoused philosophy, one regulator stated:²⁶²

To the extent it states that all activities expressly authorized by the permit are allowed without permit revision or notification, this regulation merely states a truism and is unnecessary and confusing. To the extent it states that operations which are not regulated or prohibited by the permit do not require notification or permit revision, it is misleading, erroneous and void. A permit to operate X type of facility is not a permit to operate something else, using different processes or materials. A permit allows only what it reasonably means to allow, not everything it does not specifically prohibit.

The minor permitting amendment section 70.7(f) was criticized as it foreseeably allowed an equity problem to develop between the states that choose to utilize the procedures therein and those that did not. One solution was to have EPA eliminate the provision.²⁶³

Other states opted for a different solution, similar to what industry was asking for, de minimis threshold levels. A de minimis threshold of five tons or 20 percent of the major source cutoff was suggested.²⁶⁴ These thresholds were smaller than those previously rejected by the Office of the Vice President. Allowing the states to set the

minor permit amendment threshold subjects states to pressure from industry to establish lenient thresholds.

States were also concerned that they were going to be required to administer a two permit system.²⁶⁵ A state or local permitting authority could have a separate permit systems for sources below the Act's minimum requirements. The same emission point could have two different emission limits, one federally enforceable, and one that is state enforceable. EPA would only be able to enforce the limits in an approved SIP, while the state would be required to enforce its most recently promulgated rules that were not yet in an approved SIP and therefore not applicable through Title V of the Act. This was due to the length of time it takes to have a SIP change approved.²⁶⁶

Some states believed EPA's intention not to enforce state issued operating permits was an attempt to lower standards used in issuing permits and could lead to the demise of the state permit system.²⁶⁷

Several states believed that the public comment period should not be required for minor modifications, and that the administrative amendment provision, proposed 40 C.F.R. § 70.7(e), should be expanded.²⁶⁸ EPA could ease the burden on permitting authorities by allowing batch submissions of administrative amendments.²⁶⁹

According to the State of California Air Resources Board (CARB), EPA's permit program was on weak legal ground. CARB objected to virtually every method EPA had proposed to implement flexibility. Its comments would receive serious consideration given California's leadership in air issues and its estimated 60,000 sources with more than 200,000 active operating units.²⁷⁰

CARB recommended that proposed 40 C.F.R. § 70.6(d)(3)(ii) be modified to authorize only those changes expressly anticipated and allowed by the operating permit to be included in the operational objective within statutory limits. A permit with reasonably identifiable operating scenarios would meet the requirements of section 502(b)(10) which provides for changes within the confines of the permit.

The off permit provision at section 70.6(d)(3)(iv) lacked legal justification. The statute allows flexibility within the terms of the permit, and does not authorize EPA to provide a fast track for changing the terms of the permit.

EPA had justified section 70.7(f), minor permit amendment on CAA section 502(b)(6). It provided procedures to implement the operational flexibility provision of section 70.6(d)(2).²⁷¹ According to CARB, the minor permit amendment procedure would allow stationary sources to rewrite their own permit terms above or beyond what the permitting authority has required and did not appear to be legally founded. The laxity of allowing increases that do not constitute modifications is inconsistent with the overall need to maintain reasonable further progress in attaining the NAAQS.²⁷² Emissions could increase substantially without triggering any of the definitions of modification under Title I without violating any of the provisions of the Act. Proposed 40 C.F.R. § 70.6(d)(2) violated section 502(b)(6) of the Act by not providing procedures for public notice, comment, a hearing and judicial review. Section 70.7(f) also violates section 505(a)(2) of the Act, which requires the permit authority to provide an opportunity for affected states to comment on the terms and conditions of the permit. It violates section 505(a)(1)(B) which requires the permit authority to transmit every proposed permit to EPA for a 45 day review period prior to its issuance. It violates 502(b)(10) by going outside of the permit to derive flexibility.

The Texas Air Control Board believed that states should be allowed to implement the statutorily required operational flexibility through a variety of options such as well written Title V permits that account for reasonable source flexibility and streamlined state NSR programs that standardize relatively minor permit changes and use general permits.²⁷³ EPA should not require full permit reopening for emissions reductions required by SIP rules or previously approved through state NSR permits. EPA should establish a system of expanded administrative permit amendments to update the Title V permits.

South Coast Air Quality Management District argued that section 116 of the Act explicitly allows state requirements to be more stringent than the federal law requirements. Even without section 116, it is presumed that Congress did not intend preemption into areas traditionally subject to police power.²⁷⁴ A law may interfere with state and local police power only to the extent Congressional intent is clear and manifest.²⁷⁵

VIII DUELING LEGAL OPINIONS

A. EPAs Interpretation of Minor Permit Amendments

EPA had become embroiled in a dispute with the Office of Management and Budget (OMB), and the Council on Competitiveness, chaired by Vice President Dan Quayle over the minor permit amendment provision. Industry sought a de minimis exception to the permit modification procedures which would allow increases in emissions that did not rise to the level of a Title I modification thus avoiding public notice and comment and eliminating the requirement that prior notification of the changes be given the permit authority.

On August 16, 1991, E. Donald Elliott, General Counsel, EPA, prepared a legal memo as he was readying for his departure from EPA to academia. In a prior hearing before Congress, Elliott had defended the minor permit amendment procedure.²⁷⁶

The new opinion noted that proposed minor permit amendments section appeared to authorize changes resulting in an increase in emissions above the emissions allowable under a permit, without public notice, hearing, or EPA review, provided the changes do not constitute modifications under Title I, merely upon providing seven days notice to the permitting authority. If the section is interpreted to allow changes to the emissions allowable under a permit based merely upon seven days notice to the permitting authority, it was highly unlikely that a reviewing court would uphold the regulation.

Elliott's opinion relied upon the requirement in section 502(a)²⁷⁷ that a source may not operate except in compliance with a permit. Thus a source that increases

emissions from those specified in the permit, seeks to operate in conflict with a permit requirement, must seek a permit change. Section 502(b)(10), according to Elliott, outlined a limited exception to the requirement that changes be preceded by a revision to the permit. Unless a change is within section 502(b)(10) there is nothing in the Act that allows it to occur without undergoing the revision process. The general counsel added that, the terms "modification" and "revision" were used interchangeably throughout the statute.

The general counsel reviewed sections 505(a)(1)²⁷⁸ and section 505(b)²⁷⁹ and concluded that by giving citizens a right to petition EPA based on objections in the public comment period, Congress intended EPA to review and have an opportunity to veto proposed permit modifications.

Based on the requirement for public notice, including offering an opportunity for public comment and a hearing, and requirement for expeditious review of permit actions, including applications, renewals, or revisions and including an opportunity for judicial review, the general counsel concluded Congress clearly intended that there be a public comment process for permit revisions, since the right to judicial review is extended to any person who participated in the public comment process.

Next the Counsel quoted principles of administrative law relating to interpretations of ambiguous statutes; that courts read into ambiguous statutes opportunities for public notice, comment and judicial review. This presumption also applies to modifications as well as to initial issuance of a permit.²⁸⁰

This opinion was widely circulated and quoted. Congressman Henry Waxman scheduled hearings of the Health and Environment Subcommittee of the House Energy and Commerce Committee and accused EPA Administrator Reilly of acting illegally by not promulgating regulations in accordance with the Elliott memo.²⁸¹ According to Representative Waxman, the issue regarding the promulgation of the operating permit regulation was whether President Bush would allow industry free reign to dictate changes

in EPA's control programs, or allow EPA, in accordance with the Elliott memo, to implement the law.

According to Congressman Waxman, the White House Council on Competitiveness and Vice President Quayle were threatening the integrity of the legislative process through wantonly illegal activities of the White House Council which had written over 100 weakening changes to the regulation.²⁸²

Congressman Waxman sought, but did not receive, a commitment from the EPA Administrator to require public participation in minor permit amendments.²⁸³

EPA prepared a draft permit rule in October 1991 which eliminated a de minimis exception, and required ten days notice to permitting authorities before any changes to permits could be made.²⁸⁴ Other changes, presumably minor amendments, gave states 28 days to review proposed changes, and EPA 45 days.

The de minimis proposal would have allowed for changes that increased emissions by ten percent of emissions allowed by the permit, or 20 percent of the applicable definition of major source or five tons per year, whichever is less, to be exempted from the minor permit amendment requirements.²⁸⁵ Thus changes within these limits could be processed as administrative amendments which required neither advance notice to the permitting authority nor public notice and comment under section 70.7(e).²⁸⁶

It is difficult to understand EPA's reluctance to use de minimis thresholds in Title V. Industry and most states commenters supported their use. Alabama Power²⁸⁷ provided strong authority for development of a de minimis thresholds.

Industry also complained about the October draft's requirement for advance notice before a facility could shift between operating scenarios. Considering that these scenarios were required to be identified in the permit before the source could engage in shifting and would have already undergone public comment and scrutiny, industry undoubtedly did not believe this additional review was necessary.²⁸⁸

On January 28, 1992 in his State of the Union Speech, President Bush announced a 90 day regulatory moratorium. No regulations would be issued for 90 days pending their cost benefit review for effect on the economy. State attorney generals, the NRDC and the Sierra Club served notice they intended to file suit against EPA in 60 days unless the final regulations were promulgated.²⁸⁹

The Administrator of the EPA, William Reilly asked Attorney General, William P. Barr, for an opinion on whether the EPA has discretion under the Act to allow states to adopt procedures authorizing permit holders to make minor amendments to permits without public notice and comment.

B. The Department of Justice Opinion

The Department of Justice (DoJ) opinion provided in response memorialized advice previously provided by DoJ to C. Boyden Gray, Counsel to the President in a March 25, 1992 letter, and an earlier oral opinion in Fall 1991.²⁹⁰ The DoJ concluded it was permissible for EPA to approve minor permit amendment procedures that did not require public notice and comment. This was a permissible construction of sections 502 and 505 of the Act, assuming the procedures adopted are otherwise reasonable in light of the statute.

The DoJ added an independent basis for allowing EPA to adopt the exemption from public notice and comment, the de minimis theory, citing Public Citizen v. Young.²⁹¹

The DOJ review noted the three classes of permit revisions proposed by EPA; permit modifications, minor permit amendments, and administrative amendments and the different procedures for each. Permit modifications, proposed 40 C.F.R. § 70.7(d), were subjected to all the procedures that the EPA would apply to original permit applications, including public participation and federal oversight.²⁹² Administrative permit amendments, section 70.2(c), were at the other end of the spectrum and would simply

involve mechanical corrections or updates that would not relax applicable requirements. Any difficulty clearly lie with the minor permit amendment procedures.

Next the DoJ employed the two step analysis elucidated in Chevron v. N.R.D.C.²⁹³ to determine if there was a clear indication in the Act or its legislative history that public comment was required for minor permit amendments.

To sustain the administration interpretation of what minimum procedures were required, the DoJ had to show that the propositions relied on in the former general counsel's opinion were not clear. If not clear, Mr. Elliott's conclusion, that public comment is required, would not be required under step one of Chevron.

The first proposition was that section 502(b)(6) of the Act requires public notice and comment for all permit revisions. DoJ, like the former general counsel and the NRDC, divided section 502(b)(6) into four elements. The DoJ disagreed with the position advocated by NRDC and Mr. Elliott, and declined to read element four in conjunction with element three. DoJ concluded that element four²⁹⁴ established an opportunity for judicial review not public comment, required by element three.²⁹⁵ Element three unlike the other four elements does not indicate to what actions it applies. Where Congress has required public notice and opportunity to comment, it has been done specifically. Examples in the Act included section 504(d), section 169A, and in the Clean Water Act, 33 U.S.C. 1342 (public hearing before issuing a pollution discharge permit). The absence in Title V of an explicit provision for public comment on permit amendments, "places a heavy burden on anyone who would argue that such public comment is unambiguously required under step one of Chevron for all permit amendments."²⁹⁶ DoJ noted that the former general counsel, Mr. Elliott, in his testimony before Congress, stated that section 502(b)(6) was ambiguous.²⁹⁷ It would be awkward construction and unusual for Congress, concluded DoJ, to specify in such an indirect manner that public notice and comment elements must apply to precise categories of permit actions.

In section 502(b)(6), argued DoJ, Congress gave EPA a broad grant of discretion to ensure that State permit programs provide adequate, streamlined and reasonable procedures for various permit actions. Application of Chevron to this section did not result in a clear indication of Congress' intent that would foreclose EPA from allowing substantive permit revisions on a fast track basis.

The second assertion DoJ sought to overcome was that section 502(b)(10) is the only vehicle for changes at the source that do not require permit revisions involving public notice and comment. DoJ dispatched this proposition, arguing the minimum requirement that states provide abbreviated procedures for implementing the particular class of changes specified in section 502(b)(10), can not be read to preclude all other expeditious permitting actions conferred by section 502(b)(6). In addition, the former general counsel's discussion of administrative law principles requiring public comment was flawed.²⁹⁸

The reference to public comment in section 505(b) applies to all permit revisions, including minor permit amendments was the third and most difficult proposition to surmount. According to DoJ, section 505(a) establishes procedures applicable to permit modifications, for EPA to receive copies of permit applications as well as applications for modification or renewals.²⁹⁹ Section 505(b)(2) of the Act provides that any person may petition EPA to veto a proposed permit on the basis of objections raised in the "public comment period provided by the agency." In the proposal, a minor permit amendment and permit modification were separate subclassifications of permit revision. If "modification" and "revision" were used interchangeably then all revisions including those labeled minor permit amendments constitute modifications within section 505(a). Section 505(b)(2) signifies public comment is required for any modification under section 505(a). It did not appear to the DoJ that "modification" and "revision" were clearly used interchangeably throughout the Act.

It was possible, however, that a court could conclude, substantive changes to the limitations contained in a permit would require issuance of a modified permit under a theory that any relaxation in emissions allowables would be a permit modification subject to EPA review under section 505. Any relaxation of emission allowables in the permit would literally be a "permit modification" though not a Title I modification.³⁰⁰

According to the DoJ, this conclusion would not resolve whether section 505 would permit the EPA discretion under section 502(b)(6) to create a procedural distinction between permit modifications that involve Title I modification and those that do not.

Since changes that do not constitute Title I modifications and do not increase emissions above existing limits do not require revision, (based on section 502(b)(10)), then EPA could conclude that these two types of changes are the most important to Congress in determining the procedural treatment of changes affecting the permit. There seemed to be a basis for requiring more elaborate procedures for permit revisions involving Title I modifications. The difference, said DoJ, between Title I modifications and changes that do not constitute Title I modifications *may* provide a statutory justification for a decision to allow states to accord intermediate procedural treatment to section 502(b)(6). operational changes that result in emissions increases but not Title I modifications.

This was the answer the administration was looking for. One thing was clear, the legislative history was not clear, nor were the propositions asserted by the former general counsel.

In addition the DoJ provided the administration a second independent basis, the de minimis exemption theory, whose use had not been discussed by Elliott, that could be used to authorize permit exceedances without prior public notice and comment. EPA would have to demonstrate from the record that, with respect to such exceedances, requiring full public participation in the permit revision process would produce an insignificant regulatory benefit.³⁰¹

EPA was cautioned that the reasonableness of a minor permit amendment mechanism would be influenced by comparing it to the statutorily mandated revision mechanism in section 502(b)(10). Minor changes in the physical plant, methods of operation, or the utilization of production capacity, concluded DoJ, might be necessary for operational flexibility, and some minor permit amendment procedure may be found permissible. A broader interpretation could have a "potential to undermine the regime" created by the notice and comment process in section 502(b)(6)³⁰²

C. The President Makes the Call

Once DoJ determined that public notice and comment were not required for minor permit amendments, the difference in opinion between EPA and the Office of the Vice President devolved into a policy argument.

Ultimately the Chief Executive was called upon by the Vice President to resolve the dispute. President Bush sided with the recommendation that public notice and review were not required for minor air emission increases. States would have the discretion to mandate a public comment period if they deemed one necessary.³⁰³ Subsequently, EPA adopted the DoJ opinion, repeating much of it in the preamble to the regulations, and set about modifying its draft to comport.³⁰⁴

IX EPA's FIRST ATTEMPT AT A FINAL RULE

In its first attempt at promulgating the final rule,³⁰⁵ EPA tried to respond to industry, states, environmentalists, and the White House. This attempt would end in failure.

A. Definition of Major Source

EPA defined a major source in terms of all emissions units under common control at the plant site (i.e. within a contiguous area in the same major group, two digit, industrial

classification).³⁰⁶ For the purpose of defining "major source," proposed 40 C.F.R. § 70.2 provided.³⁰⁷

a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same major group. (i.e. all have the same two-digit code as described in the Standard Industrial Classification (SIC) Manual, 1987.

Once subject to the part 70 operating permit process for one pollutant, a major source must submit a permit application including all emissions of all regulated air pollutants from all emissions units located at the plant, except only a generalized list needs to be included for insignificant events or emission levels.³⁰⁸

DoDs request that a definition be added to "major source" for common military control was spurned by EPA. The Administrator saw no purpose in defining common military control for purposes of Title V, as the term was not issued with the regulations as promulgated.³⁰⁹ EPA narrowed the definition of stationary source, in section 70.2, eliminating language that included "activities," and "pieces of equipment" from the definition.³¹⁰

B. Source Category Exemptions

EPA provided for source category exemptions for both asbestos demolition, required to obtain a federal operating permit solely because it is subject to NESHAPS for asbestos, and wood stoves, regulated under the NSPS,³¹¹ in the final rule.³¹² These exemptions were based on two reasons, first, that permitting such sources would be impractical and infeasible for permitting authorities.³¹³ The second, the burden federal permitting would place on homeowners, distributors, and manufacturers.³¹⁴ EPA estimated the number of wood stoves potentially subject to permitting to be in the hundreds of thousands. A requirement to obtain a permit for owners of residential wood

heaters is unnecessary in some areas and should remain at discretion of state and local agencies. Regarding asbestos demolition, little if any additional benefit to the environment would be incurred by permitting since EPA and delegated states already receive notice of these activities and can target and prioritize enforcement.³¹⁵ This relieved states from having to make this decision individually.

Chemical and pharmaceutical manufacturers did not obtain the exemption sought for research and development facilities. EPA noted that states will have flexibility to treat research and development facilities as separate from a co-located manufacturing facility.³¹⁶ This would allow a research or laboratory facility to avoid permitting under Title V unless it is a major source by itself.

The EPA allowed states to defer nonmajor sources from the permitting program for five years.³¹⁷ It dropped the requirement that nonattainment areas demonstrate that the deferral would not impact attainment.

C. The Final Rule's Operational Flexibility Provision

By the conclusion of the comment period operational flexibility in general and the minor permit amendment procedure specifically, had become the most controversial issues of the Act itself. EPA faced head on the first of many politically sensitive issues, the stringency issue - the extent to which states would be required to provide operational flexibility in their permitting programs.³¹⁸

EPA noted the comments provided by state commenters, who saw no statutory basis for their being required to adopt the operational flexibility rules, and rejected their conclusion. It also noted industry's support of the provisions as necessary to allow American industry to remain competitive and adjust to changing market conditions.³¹⁹

EPA concluded that state permit programs would be required to meet the operational flexibility requirements of section 502(b)(10). Section 502(b) expressly required state programs to meet minimum elements, they are not rendered discretionary by

sections 116 and 506(a) which could not be read to alter an express requirement such as that contained in 502(b)(10).³²⁰

EPA believed the dual permitting concern to be exaggerated by states.³²¹ Section 502(b)(10) does not allow violation of an applicable requirement. Provisions required solely under state law that do not implement an applicable requirement do not have to be processed under Title V. While some states may be compelled to operate a two permit system, it should take the form of a single permit with separate state only provisions.

Although EPA required states to include operational flexibility, it rejected industry's attempt to characterize section 502(b)(10) as authorizing sources to give seven days notice and then use an internal bubble to meet permit limits by using an average of all emissions across the facility. Nothing in section 502(b)(10) or Title V creates authority for any one unit to violate an emissions limit imposed by a SIP on each emissions unit even if the average emissions do not exceed those under the SIP.³²²

Section 504(a) mandates that permits must assure compliance with applicable requirements of the Act. "Where those requirements do not provide for bubbling, the permit may not do so."³²³ EPA believed emissions averaging provisions are complicated to implement and required careful review to ensure that the trading plan allows the same emissions as otherwise applicable requirements. Seven days is too short a period of time to conduct such a review.³²⁴

The regulations implementing section 502(b)(10) were designed, according to EPA, to encourage emissions trading as much as possible consistent with the applicable requirements of the Act and the need of states to review emissions trading.³²⁵ EPA has not, however, mandated use of emissions trading if it is inconsistent with the SIP. The key to flexibility under this section is the SIP requirements. Where a SIP allows pooling or netting, industry will be able to achieve some measure of flexibility.

In a change from the proposal, the flexible source operation definition was omitted.³²⁶ In its place was a new definition, that of "section 502(b)(10) changes."³²⁷

These were defined as changes that contravene an express permit term. They are limited, however, in that they do not include changes that would violate applicable requirements,³²⁸ or federally enforceable permit terms.³²⁹

At first it is difficult to reconcile that part of the definition, "that contravenes an express permit term," with section 502(b)(10) of the Act itself, which does not speak in terms of contravention of requirements, but rather allows changes that are not modifications under Title I and that do not increase emissions. What could be contravened?

D. Types of Operational Flexibility Provided By the Final Rule

Inherent flexibility is not provided by regulations as it already exists. This is the flexibility sources have under their permits to make changes that are not constrained under the permit.³³⁰ An example of this type of flexibility includes sources moving equipment without providing notice or obtaining a modification if the move does not affect federally enforceable permit terms or applicable requirements. A painting facility could switch paint colors or formulations freely as long as each paint complies with the VOC limit in the permit.³³¹ It is difficult to distinguish this form of flexibility from off-permit flexibility.

The second type of operational flexibility provided was the operational flexibility allowed under section 502(b)(10). EPA provided three methods by which operational flexibility could be provided in state permit programs. The first and third methods were mandatory components of state programs.³³² All required that seven days advance notice be given to the permitting authority. Changes could not constitute a modification under Title I, nor exceed emissions allowable under the permit. Emissions allowable included a federally enforceable permit term or condition determined at issuance to be required by an applicable requirement that establishes an emissions limit or a federally enforceable emissions cap. Changes under section 502(b)(10) can not increase emissions beyond what is provided for by the terms and conditions of the permit.

1. The first mandatory component of a state permit program allowed sources to make section 502(b)(10) changes without requiring a permit revision, if the changes were not modifications under any provision of title I of the Act and did not exceed the emissions allowable under the permit.³³³

An example of this type of change would be a permit in which the federally enforceable portion specifies a particular brand of coating with an applicable emission limit. Section 70.4(b)(12)(i) would allow the source to change the brand of coating using seven days notice even though it contravenes the permit.³³⁴ The permit shield does not apply to any change made under this provision.³³⁵

The ability to change a particular brand of solvent specified in a permit did not appear to a chief industry concern. What it wanted was to be able to increase emissions if the increase did not amount to a "modification." Through internal netting, industry would have met the requirement that emissions not be increased. By limiting section 502(b)(10) changes to exclude changes in "applicable limits" EPA had produced a limitation that precludes an increase in emissions that renders the ability to increase emissions to the level of a modification meaningless. Flexibility can be obtained only if the SIP emissions limit does not apply to each discrete emissions unit at the facility.

2. In the optional method of providing operational flexibility, states could allow emissions trading based on the SIP.³³⁶ States could provide sources the option to trade emissions within the permitted facility to meet SIP limits where the sources' permit does not provide for such emissions trading but the SIP does. It was available in those cases where the permit does not already provide for emissions trading.

This provision would allow sources that had not anticipated needing to trade emissions within the facility to take advantage of emissions trading. The permit for the source would include the SIP emission limits. After giving notice the source could meet the SIP limits using the trading provision approved in the SIP. This provision allowed states to restructure their SIPs to provide for emissions trading. The notice accompanying

the permit would indicate that the source is complying with the implementation plan's trading and compliance provisions, rather than terms set in the permit. Although this option appears desirable from a source perspective, EPA acknowledges that it lacks authority in the Act to overturn a state decision whether or not to allow trading in the implementation plan.³³⁷ If the state does not allow trading in the SIP then the source is without a remedy so to speak. EPA was unaware of any SIP that is structured to allow a source to opt in to emission trading by giving seven days notice.

3. The second required method was use of emissions trading to comply with permit limits under an emissions cap. Section 70.4(b)(12)(iii)³³⁸ states:

The program shall require the permitting authority, if a permit applicant requests it, to issue permits that contain terms and conditions, ... allowing for the trading of emissions increases and decreases in the permitted facility solely for the purposed of complying with a federally enforceable emissions cap that is established in the permit independent of otherwise applicable requirements.

The type of federally enforceable emissions cap included in this provision is one that is independent of applicable requirements, a source created cap. These caps are set to avoid the imposition of technological requirements for major sources or limit applicability of applicable requirements in a SIP. Such limits allow sources to be considered minor and avoid installation of particular levels of air pollution control equipment.³³⁹ Using federal emissions caps would not assist a large source that is already considered major. On a large source, a limitation of this kind could create difficulties increasing production to respond to a pickup in the economy. The permit must also include the limitations with which each emissions unit must comply under any applicable requirements and including the SIP.

EPA provided an example of how this provision would work, a source may request that the permit provide for emissions trading, structure its permit so that the emissions caps at the permitted facility created a pool of unused emissions under the

voluntary limit on the sources potential to emit. The facility could then implement an emissions trading plan in its permit which would allow it to apply the unused emissions at any particular emission unit after seven days notice.³⁴⁰ "Obviously" according to EPA, the source may use this pool of emissions to increase its emissions on any unit only as high as allowed by the applicable requirements for that emissions unit, if any.³⁴¹

The permitting authority is not required to include in the emissions trading provisions any emission units for which emissions are not quantifiable or trades not replicable.³⁴² The permit shield may be extended to cover these changes in emissions.

Potential difficulties with this provision for a source included the requirement that the permittee must request and propose and structure procedures to ensure trades are replicable, enforceable, accountable and quantifiable under the permit cap.³⁴³ These caps are set by sources to avoid the application of technology based standards. One expects such provisions offer little benefit to a source that is already major. Such a provision would appear to hamstring a source in the event of a upswing in the economy that triggers as a response increased production. Although EPA has issued guidelines on what constitutes and how to design and implement federally enforceable permit limitations,³⁴⁴ these are limited in their application.

The decision as to whether the emissions impacts are quantifiable was left to the permitting authority. As an example of non-quantifiable emission limits, EPA cites those subject solely to work practice standards with no quantifiable emissions limitation.³⁴⁵ The permitting authority must include the emissions trading procedures in the permit.³⁴⁶

In addition to the foregoing methods of establishing operational flexibility under section 502(b)(10), states were required by the new rule's 40 C.F.R. § 70.4(a)(9), to provide for alternative operating scenarios, including emissions trading to the extent allowable by applicable requirements identified by the applicant in its application and approved by the permitting authority.³⁴⁷

EPA required alternative scenarios, not based on section 502(b)(10) as had been suggested by environmental commenters, but on what it termed the mandate in section 502(b)(6) of the Act to include "[A]dequate, streamlined, and reasonable procedures" for permit actions.³⁴⁸ The rationale was a permit containing approved alternative operating scenarios would be more complete and more accurately reflect the operation at the permitted facility. One limitation of the alternative scenario option was the difficulty, it was nearly impossible, to anticipate in advance all the different operating scenarios. Permitting in the worst case, according to the EPA, avoids listing many of the scenarios that would be allowed under the worst case scenario.³⁴⁹

The greatest concern of environmentalists and states with this provision was the challenge it presents to enforcement. All applicable limits would need to be included in the permit for the different alternatives. This would present a tremendous burden to permitting authorities during the initial permit application.

Trading of emissions within the facility, netting, was another area of flexibility offered to sources. If a source requested terms and conditions allowing emissions trading within the facility, to the extent the applicable limits (read SIP) provide for trading of increases and decreases without a case by case approval of each emissions trade, the permit must provide them.³⁵⁰ To enhance enforcement, the SIP or applicable requirement would have provided replicable procedures to ensure that trades are accountable, enforceable and quantifiable. If the SIP provision authorizing trading has not established in advance the replicable procedures to ensure the alternate limits are enforceable, the permitting authority must establish such procedures in the permit.³⁵¹

To take advantage of the flexibility this provision offered, states could develop alternative emissions limits through the permit process under section 70.6(a)(1)(iii).³⁵² A state could choose to adopt a SIP provision that would authorize sources to meet either the SIP limit or an equivalent limit to be formulated in the permit process. The permit would then contain equivalent determinations and provisions ensuring enforceability.

Trading was not possible under this provision if the applicable limits did not provide for emissions trading.

Off permit changes, section 70.4(b)(14), was made optional by finding that states as a matter of State law, may prohibit sources from making changes without a permit revision. Because EPA thought off permit changes valuable, it added that a state prohibition on making off permit changes would not be enforceable. Yet this was limited as EPA recognized that requirements of approved SIPs were applicable requirements and enforceable under Title V. The permit shield did not apply to off permit changes.³⁵³

EPA limited off permit changes to those that do not constitute Title I modifications. "It is only relatively minor changes that can be made off permit without permit review."³⁵⁴ It noted in the preamble to the rule that Title I modifications should not take place outside the permit process.³⁵⁵ It would be difficult to administer a marketable permit program if an operating program was not an accurate representation of the permitted facility's actual emissions.

Language in the proposal,³⁵⁶ which stated neither notification to the permitting authority and EPA nor revision were required for off permit changes, was deleted. State commenters had been nearly unanimous in their condemnation of this provision. In response, EPA required contemporaneous written notification of these changes.³⁵⁷ The permittee was required to keep a record describing the changes. EPA provides no guidance as to what type of change would be permissible under this provision.

The existence of many of the operational flexibility methods provided by EPA in the regulation, depended upon applicable requirements in the SIP as devised by the states. Despite industry's desire to ensure operational flexibility as provided in Title V of the Act on a national level, it would be implemented on a state by state basis dependent upon SIP provisions.

E. Types of Permit Revisions

In the proposed regulations, EPA had three tiers of permit revision, administrative amendment, minor permit amendment and permit modification. The new rule kept the three tiers of revisions intact, renaming the minor permit amendment as the minor permit modification.

The administrative permit amendment section was not changed substantially from the proposal.³⁵⁸ Qualifying changes remained the same. Permit requirements could be incorporated into the permit from preconstruction review programs, provided the program met EPA procedural standards.³⁵⁹ Texas already such a program which required permits from sources but used expedited procedures including general permits to avoid delay, read public comment and participation.³⁶⁰ EPA required that states identify the list of types of amendments they proposed to treat as administrative permit amendments.³⁶¹

EPA determined administrative amendments could not be used for de minimis changes as these are changes that increase emissions, which requires a permit modification.³⁶² Nor would amendments be appropriate under section 112(g) since any modification under section 112(g) is a Title I modification.³⁶³

The administrative amendment procedures allowed the source to make the change addressed in the request immediately upon submittal.³⁶⁴ The permit shield may be applied to the changes made through incorporation of the preconstruction permit review process.

EPAs final rule changed the minor permitting amendment process significantly addressing many of the state stringency concerns. Minor permit modification procedures were distinguished from modifications by the degree of public notice and comment required and the ability to implement the change before review by permitting authorities.³⁶⁵ In the proposal, state discretion to issue minor permit amendment procedures was limited in two ways, the proposed change could not constitute a modification under any provision of Title I and the changes had to comply with all

applicable requirements of the Act.³⁶⁶ Industry sought to make the minor permit amendment process a mandatory component of a state permitting program.³⁶⁷

In the new rule, the minor permit amendment section was renamed, the minor permit modification procedures.³⁶⁸ States were required to provide streamlined, adequate and reasonable procedures for expeditiously processing permit modifications, but were given the option of developing different procedures for different types of modifications and providing public notice and comment.³⁶⁹ Allowing states this discretion however put those states that required additional public notice and comment at a competitive disadvantage compared to those states that merely met the EPA minimums. States could not provide for less public notice or comment in their procedures.

The basis for which a minor permit modification can be made was narrowed by four additional limitations.³⁷⁰ Minor permit modification procedures could be used only for those modifications that:

1. Do not violate any applicable requirement,³⁷¹
2. Do not involve significant changes to existing monitoring, reporting or recordkeeping requirements in the permit (this provision was added to prevent sources from decreasing the requirements related to enforcement),
3. Do not require or change a case by case determination of an emission limitation or other standard,
4. Do not seek to change or establish a permit term or condition for which there is no underlying applicable requirement and that the source has assumed to avoid an underlying applicable limit, including a federally enforceable emissions cap that avoids classification as a modification under Title I,
5. Are not modifications under any provision of Title I, and
6. Are not required by the state program to be processed as a significant modification.³⁷²

While the minor permit amendment process could still be used to process changes that did not amount to modifications, theoretically allowing increases as large as 40 tons per year for nitrogen oxides under the de minimis exceptions in Title I,³⁷³ states could easily restrict the size of a modification through more stringent applicable requirements in SIPs or through exercise of the discretion given in section 70.7(e)(2) to use different procedures for more significant or complex modifications. Industry could not be pleased given its comments in the rulemaking.

In the May 1991 proposal, minor permit amendments had required a seven day notice period before a change could be made.³⁷⁴ Some in industry had opposed this requirement stating it was too long a period to respond to changing economic circumstances. The new rules were an attempt by EPA, in response to the DoJ opinion, to structure the minor permit modification procedure to accommodate the operational flexibility desires of industry with the states belief that seven days was insufficient to review a permit modification request. EPA characterised industry as not disputing its obligation that permit revisions comply with applicable requirements but not wanting delay in a decision to comply with the Act under the new permit terms.³⁷⁵ The rule provided that permit authorities could allow the source to make the change immediately after filing the application, pending processing of the permit modification application.³⁷⁶

Public notice and comment did not have to be provided unless the permitting authority rules were more stringent than the EPAs. EPA disagreed with commenters who asserted that by allowing certain changes to take place without public notice and comment as required in permit issuance and renewal, EPA would undermine the effectiveness of the permit program.

The de minimis rationale supported not burdening sources with all of the procedures required for initial or significant permit modifications. To prevent enforcement from being undermined EPA added a restriction on using minor permit modifications to make significant changes to monitoring, reporting or recordkeeping.³⁷⁷

Within five working days, the permitting authority must notify affected states and the EPA of the requested modification.³⁷⁸ EPA received 45 days to review the proposed change. The permitting authority could not issue the permit until EPA review period expired or EPA indicated it had no objection. Within 90 days of receipt of the application or 15 days after the end of the EPA review process, the permitting authority could issue the permit modification or alternatively determine that the change should be processed under the procedures for a significant modification.³⁷⁹ During this interval the source was required to comply with both applicable requirements and proposed permit terms.³⁸⁰

The enhanced government review would, according to EPA, ensure that any modification of a permit would comply with the Act despite not having public notice or comment. Despite this, EPA did not extend the permit shield to these modifications.³⁸¹ The absence of a permit shield allows states, EPA and citizen enforcement of the Act requirements according to EPA. How citizens will be able to enforce the permit if they do not receive notice of the change was not addressed.

The changes provided for substantially more review than the proposal which merely provided seven days notice to the permitting authorities. Operational flexibility concerns were met by allowing sources the ability to make changes after initial notification. The downside was that states had flexibility to allow the particular change sought to be processed as a minor permit modification, and whether to include public notice and comment procedures. Under this provision, sources would have to shift lobbying efforts to State capitals.

EPA adopted a state suggestion³⁸² and allowed small changes to be grouped for review on a quarterly basis.³⁸³ Some changes were so insignificant in size alone, according to EPA, that while they should not be exempted from the modification process, a state could conclude the burden of processing them individually was not justified.³⁸⁴ EPA provided thresholds of what it considered insignificant emissions increases to be. Changes below the EPA's threshold level, ten percent of the emissions allowed by the

permit for the emissions unit, 20 percent of the applicable definition of major source, or five tons whichever is smallest, could be made before notice was given and without public comment.³⁸⁵ States could set alternate thresholds considering the administrative burden that would be imposed by immediate permit modification review and whether individual processing of changes below the threshold level would result in trivial environmental benefits.³⁸⁶

The group processing provision provides an example of EPA's reliance on the de minimis theory in the minor permit modification rule. While EPA did not exempt sources based on the theory it used it to provide legal support for not burdening minor changes with all of the procedures required for initial permit applications or significant permit modifications. It was also used to justify allowing a source to be temporarily exempt from the requirements of section 502(a), allowing it to operate within its proposed permit while the modification is being reviewed.

For permit changes that could not be processed under administrative or minor permit modification procedures the significant modification procedures applied.³⁸⁷ The first question that arises is what is a significant change. At a minimum every significant change and relaxation in monitoring, permit terms or conditions and relaxation of reporting and recordkeeping requirements shall be significant.³⁸⁸ Significant modifications were required to meet all requirements including public participation, and review by permitting authorities.³⁸⁹

Public participation requirements included publication of the change in a newspaper of general circulation or a state publication designed to give legal notice, notification to those on a mailing list, including those who request in writing to be put on the mailing list.³⁹⁰ At least 30 days public comment is required and 30 days notice of the hearing on the draft permit is required.³⁹¹ The permitting authority was required to complete an average of all the applications in nine months.³⁹²

Given the expressed desire of industry to be able to make changes quickly in response to changing market conditions, it is readily apparent why the minor permit modification process was so important to preservation of this ability. Nine months would be an extremely long period of time to await a permit modification.

X. THE LAWSUIT AND SETTLEMENT PROPOSAL

Even with the flaws in the permit modification procedures, given the less than solid foundation upon which the modification process rested, the final rule was their pinnacle. In a move than can best be described as a preemptive strike, CAIP filed a petition for review of the regulation.³⁹³

On July 8, 1994, EPA Administrator Carol Browner announced the EPAs reproposal of the State Operating Permit Program, 40 C.F.R. Part 70, that had been issued as a final rule in July 1992. The reproposal came as part of the settlement process of Clean Air Implementation Project v. EPA.³⁹⁴ The parties to the lawsuit were unable to reach closure on issues relating to de minimis emissions amounts and length of reviews. The heart of the dispute had been the minor permit modification changes that industry would be permitted to make without triggering permit review.

The EPA had released an earlier draft of the proposal for revising the Title V permits rule in an attempt to educate states that had not been a party to the settlement negotiations of the developments in the lawsuit.³⁹⁵ The changes in the reproposal of the operating permit regulation do not bode well for operational flexibility as embodied in the provisions of the final rule.

XI. THE REPROPOSAL OF THE OPERATING PERMIT RULE, THE FALL OF OPERATIONAL FLEXIBILITY

A. Reinterpretation of Modification

Until a preamble is issued for the reproposal explaining EPA's rationale for the changes to permit modification procedures, one is unable to discern with assurance the legal basis for the new four tier permit revision scheme.³⁹⁶ The change the reproposal makes to the existing language of the final rule provide a strong indication that EPA has revisited the DoJ opinion.³⁹⁷ In effect EPA has exercised its prerogative to revert to the rationale employed in the Elliott memo, that "modifications" and "revisions" were used interchangeably in section 502(b)(6), and to interpret "modification" literally in section 505, not relying on it as a term of art under Title I of the Act.

One of the changes that supports this theory is obvious, permit "modifications" no longer exist in the reproposal, having been replaced by permit "revisions." Permit revision is now defined as, "[A]ny de minimis permit revision, minor permit revision, significant permit revision, or administrative permit amendment."³⁹⁸ In keeping with literal interpretation, "Title I modification" now includes any modification under section 110(a)(2).³⁹⁹ This definition is contrary to that in any of EPA's previous drafts or proposals of the operating permit regulation or DoJ interpretations.

As recently as August 1992, EPA noted that the May 1991 proposal required full processing for a permit modification involving a Title I modification. The EPA maintained this belief in the final rule, stating the proposal definition at footnote six,⁴⁰⁰ described statutory and regulatory definitions of "modification" for purposes of different programs. This definition believed to be adequate, did not include changes made pursuant to section 110(a)(2).⁴⁰¹

Minor New Source Review, a new definition, states that changes under it do not qualify as new major sources or major modifications under EPA regulations, implementing

Parts C and D of the Act.⁴⁰² Minor NSR changes occur pursuant to state implementation programs approved under regulations enacted pursuant to section 110(a)(2) of the Act. EPA asserts, section 110(a)(2) is in Title I, ergo, minor NSR changes are Title I modifications that may not be incorporated into the part 70 permit revision process through minor permit modification procedures.⁴⁰³ This argument ignores the longstanding meaning afforded "modification" under Title I. EPA may be relying upon Hercules Inc. v. EPA,⁴⁰⁴ to read this term according to its plain meaning. Such reliance would be misplaced were the evidence suggests that Congress used modification with its Title I definition in mind. Given the DoJ interpretation that Elliott's opinion was a permissible one, however, industry faces an uphill struggle to challenge the reproposal, as EPA has simply shifted from one permissible interpretation to another in an attempt to settle the lawsuit.

As a result of EPAs reinterpretation, public comment will now be required for all revisions to permits, even if they do not rise to the level of modifications under Title I. Operational flexibility concerns can be met by allowing the source to proceed with the revision subject to the public comment and state permit review processes. The operational flexibility provisions proposed at section 70.4(b)(12) with their specific prohibition on revisions, promulgated pursuant to section 502(b)(10) are likewise narrowly construed by EPA.

Essentially the only remaining flexibility option that allows a source to increase emissions to a level that does not constitute a modification and avoid revision procedures including public comment, is through shifting between alternate emission scenarios utilizing the worst possible case scenario as the permit limit.

B. Major Source Under the Reproposal

The definition of major source was left largely intact in the reproposal. Additional language was added to clarify that a stationary source that supports another source, where both are under common control and on contiguous or adjacent property shall be

considered as support facility and part of the same source if 50 percent of the output of the putative support facility is dedicated to the source, regardless of whether it has the same two digit SIC code.⁴⁰⁵

C. PERMIT REVISION UNDER THE REPROPOSAL

1. Administrative Permit Amendments

The administrative amendment procedure has been extensively modified in the reproposal. Now sources choose from three procedures depending upon the nature of the change sought.⁴⁰⁶

(a) The first set of administrative amendment procedures are those used to effect changes including typographical errors, name, address, telephone numbers and the like.⁴⁰⁷ Changes involving more frequent testing may also be added by this method. The permit authority is allowed to add other similar type changes.⁴⁰⁸ Changes meeting these criteria follow the procedure under section 70.7(e)(3).

The new procedure requires the permittee to submit an application containing an addendum to the permit. The addendum must identify the parts of the permit the source proposes to change, new terms consistent with provisions applicable to the change, specify that the addendum will be effective 60 days from date of permitting receipt.⁴⁰⁹ Why it is necessary to wait 60 days to effect a typographical, name or telephone number change is not explained. The permitting authority must provide the EPA administrator a copy of the addendum. One wonders why this type of change needs to be reviewed by the EPA.

The permitting authority may allow the source to implement the requested change immediately upon making all required submittals.⁴¹⁰ If states avail themselves of this provision they will preserve the ability of sources to make quick changes, albeit in very minor areas. By not making such a change mandatory, the EPA has lost the ability to impose a uniform nationwide rule. One innovation is that the procedure may be used by the permitting agency to impose administrative type changes on the source, including

additional testing, monitoring and recordkeeping.⁴¹¹ This procedure does not require public comment and the permit shield does not apply.

This procedure gives every indication of putting form over substance. There is a substantial amount of paperwork and review considering the nature of the changes that do not by their nature effect emissions at all. The justification for such procedures is undoubtably based on enforcement considerations.

(b) The second type of administrative change, for which an entirely new procedure is provided, is used for incorporating changes made pursuant to state new source review process (NSR) into the permit.⁴¹² Whereas the procedure provided under the old rule was a paragraph long,⁴¹³ the new procedure is a page long. The new provision establishes minimum standards for states to use in intergrating Title V requirements into the NSR permit process thereby allowing the permitting authority to use the operating permit administrative procedure incorporating the change into the Title V permit.

Sources desiring to incorporate changes from NSR determinations into their Title V permits must submit to the permit authority prior to construction or modification, an application which includes an addendum to the air permit identifying what permit provisions would change, draft terms and conditions of the permit, and an affidavit signed by a responsible official stating that the source accepts all liability for making the changes prior to the final permit amendment being issued.⁴¹⁴

This affidavit element did not appear in prior versions of the operating permit regulation.⁴¹⁵ It represents another step in the direction of enforcement and command and control procedures and is far beyond the scope of the certification required by section 503 of the Act which requires a certification of the accuracy of information provided.⁴¹⁶ One would be reluctant to sign such a broad affidavit as in the reproposal. This is substantially different than an affidavit that states the source has prepared the permit amendment in good faith and that the information provided in the permit is accurate. Given the fact that changes to the SIPs are occurring regularly it is entirely possible that a

permit preparer could prepare a NSR permit in good faith yet be subject to federal penalties for a violation of the state SIP. The reason for this procedure is that EPA is dissatisfied with state NSR procedures.

Once the source provides this information to the permitting authority, the permitting authority provides a period for public comment prior to construction of 30 days or in the case of minor NSR, not less than 15 days.⁴¹⁷ Notice and a copy of the application must be provided to the EPA by the beginning of the public comment period. For changes approved by the permitting authority under minor NSR the source shall notify EPA and the permitting authority of the anticipated start date of construction and may proceed upon postmark of such notice. For changes approved by the permit authority under major NSR, the source must notify EPA and the permitting authority 21 days before the anticipated date of initial start up of the new or modified source. For such changes the source may commence operations at the end of the 21 day period unless notified otherwise.⁴¹⁸ The proposed operating permit amendment is incorporated into the permit 45 days after EPA receives notice or 45 days after the permitting authority makes its final preconstruction decision, whichever is later.⁴¹⁹

Because a source is allowed to proceed with construction after 21 days notice or for minor NSR, upon mailing notice to EPA, this provision may be appealing if ones desire is to execute changes quickly after state using NSR procedures. However the source puts itself at a disadvantage if it proceeds pending EPA review. If the EPA objects to the change the source is liable for operating in violation of the permit it had proposed to change.⁴²⁰ An exception to source liability is provided for situations where the permit authority is able to revise the sources' proposed addendum and the changes did not effect the applicants proposed determination of which applicable requirements apply as a result of the change.⁴²¹ There would be no other substantive grounds upon which to reject a permit so the escape clause is essentially useless. One is left wondering what other basis for permit rejection exists. A source that undertakes construction and is informed of a

defect in its permit is, in the real world, in a precarious position, vulnerable to suggestions from permit authorities that may not be requirements but nice to have things.

From the operational flexibility standpoint, the new rule adds 21 days of delay before a source can implement the proposed change which compares unfavorably to section 70.7(d)(3)(iii) which allowed the source to implement the change immediately. A permit shield may be provided.⁴²²

(c) The changes eligible under the third administrative amendment procedure are those that result from standards promulgated after permit issuance pursuant to section 112 of the Act.⁴²³ The reason for this provision is that states must issue part 70 permits to all major sources of hazardous air pollutants regardless of whether there is any section 112 standard or requirement which currently applies.⁴²⁴ Because the future MACT standards are unknown, the procedures here, which involve mandatory reopening of permits, are different than those preceeding. Permitting authorities will issue schedules of compliance and sources will be required to submit implementation plans.⁴²⁵ Operational flexibility is hindered by a requirement that sources using emissions averaging alternatives that require case by case approval must apply for a significant permit revision in lieu of the minor permit revision procedure.⁴²⁶ This paragraph is confusing because the change in the addendum that will be approved under the administrative amendment procedure must still be processed through additional minor permit revision procedures to modify the permit.

2. De Minimis Permit Revision: Why Isn't Industry Happy?

The second type of revision provision utilizes de minimis changes which both states and industry have been clamoring for throughout the public comment process. The permit must provide for use of the de minimis provisions.⁴²⁷ EPA is not settled on the threshold levels that will constitute de minimis emissions, and will take public comment on the options.

A limitation on the use of de minimis revision procedures is that the threshold levels can not be met by offsetting emission increases with emission decreases at the same

source or what we have earlier defined as netting.⁴²⁸ This is contrary to what industry had asked for in the public comment period. This is another example of a provision that discourages operational flexibility, in this case the use of trading and market based incentives.

EPA distinguishes between "unit based changes," any change at small units, and "increment based changes," small changes at large sources.⁴²⁹

For a change to qualify as a unit based change⁴³⁰ eligible to use de minimis permit revision, the total emissions at an existing unit after the change, the sum of (the existing emissions before the change, plus, the emissions increase that results), may not exceed: for criteria pollutants:

Option A: Over the life of the permit: four tons of CO, one ton NO_x, 1.6 tons sulfur dioxide, 0.6 tons PM-10, one ton VOC, or

Option B: 20 percent of the applicable major source threshold or five tpy of VOC or NO_x, whichever is greater, but in not more than 15 tpy PM-10 or 0.6 tpy lead, or

Option C: five tpy

Option D: 30 percent of the applicable major source threshold or five tpy whichever is greater,

Option E: A unit size established by a state, where it can make certain showings.

These options represent the different points of view of the litigants in CAIP v. EPA.⁴³¹ Absolute numeric limits as opposed to percentage based limits favor states with numerous nonattainment areas and their resultant small major sources. By imposing stringent small emissions limits nationwide, there is no incentive for industry to relocate. Alternatively such limits discourage growth in other areas and limit emissions in other states with better air quality unnecessarily. Obviously the states would like to control the size of de minimis emissions within their boundaries. While allowing states this option does not promote uniformity; it prolongs and shifts the battle over de minimis standards to the State capital,

it is consistent with EPA's goal of allowing flexibility in state permit programs. It is in industry's interest to have the largest possible de minimis threshold. Recall that STAPPA had advocated a de minimis threshold of five tons or 20 percent, believing a ten ton, 40 percent threshold too large. One suspects EPA will split the difference, use the 30 percent option but give states the option of setting a more stringent, smaller threshold.

Options are also proposed for hazardous air pollutants (HAP) under section 112 of the Act. Here the proposed alternatives vary from zero tpy, to 20 percent of the section 112 major source threshold, or 50 percent of the section 112(g) de minimis levels,⁴³² or 75 percent of section 112(g) de minimis levels. In the public comment period, industry had advocated establishment of de minimis thresholds using existing Title I de minimis level thresholds.

A change larger than those considered under unit based changes may qualify as a de minimis increment based change if any associated recalibration of continuous emissions monitoring (CEM) equipment established in the permit is undertaken through a process that provides as much public participation as the minor permit revision process.⁴³³

Under increment based changes, no emissions increase can exceed specified thresholds, similar to those in the unit based changes.⁴³⁴ EPA has provided alternatives for consideration that range from specified limits over the life of the permit for criteria pollutants, to various percentages of the applicable major source threshold, or a specified increment amount specified by a state for use within that state where it can show that, of the estimated annual emissions increases subject to minor and major NSR in the state, 80 percent or more would be above that level. It is difficult to evaluate the impact of this alternative on sources without an idea of the threshold size.

The de minimis permit revision procedures require a description of the change, a demonstration that it meets the proposal criteria for de minimis changes, a certification by a responsible officer that the source is in compliance, and that the source accepts all

liability of making the requested change prior to final permitting authority action to revise the permit.⁴³⁵

The permitting authority may permit the source to implement the change seven days after the permitting authority's receipt of the source's application for permit revision or at its discretion grant a request by the source to implement the change after less than seven days.⁴³⁶ By allowing changes before the public comment period, this provision preserves the ability of industry to respond quickly to changes. The real issue is what set of thresholds will be adopted. Since industry desired thresholds equal to the de minimis thresholds in Title I, any of the options appear disappointing. In addition, the de minimis provisions include a public notification procedure.

The permitting authority notifies the public of de minimis changes on a monthly, batched basis.⁴³⁷ If the permitting authority affirmatively approved the change pursuant to a preconstruction permit review that included a 21 day public comment period, and the change was authorized to be made under the de minimis process, the addendum takes effect on the submission of a complete de minimis permit revision application.⁴³⁸ If the permitting authority did not approve the permit in a review that provided for 21 days of public comment, the addendum will not take effect until 30-90 days after the batch notice was given.⁴³⁹ As written the reproposal provides two options governing the time period within which persons may request the permitting authority to disapprove the change, 15-45 days. If the permitting authority does not retain authority to disapprove the permit at this juncture, the public may make the request to EPA.⁴⁴⁰ The public may petition EPA to disapprove the change within 60 days after the (30-90) day review period.⁴⁴¹

The source liability provision, section 70.7(f)(4) presents a serious threat to industry. It provides that if, after a source makes the change, the permitting authority or EPA disapproves the change, the source is liable for having operated in violation of its existing permit. Source liability could therefore be directly related to the length of the public comment period given the Act's assessment of penalties for each day of violation.

Some relief is intended to be provided by a provision that limits liability if the proposed addendum includes enforcement terms sufficient to support an enforcement action and the determination of which requirements of the Act apply to the source must be correct.

An important question raised by this provision is what will constitute enforcement terms in the permit. It gives every appearance of an attempt by EPA to link enforcement with the ability to make changes under this provision. Presumably enforcement terms which would protect a source would be suggested by the states permitting authorities, perhaps on an individual case by case basis. In such cases the state has better leverage for inserting such clauses against smaller, less sophisticated companies than large ones.

3. Minor Permit Revision Procedures

Operational flexibility will be adversely affected by the repropoals change to the minor permit modification procedure. The minor permit revision procedure may not be used to change monitoring or recordkeeping, a change from the final rule's prohibition on "significant changes" of these requirements. Some exceptions are provided.⁴⁴² Changes in the enforceable operating levels of the method, "the permitting authority has determined the source has demonstrated to be correlated to the sources existing or proposed compliance emission rate are allowed."⁴⁴³

The reproposal provisions make it difficult to use netting transactions, unless they have been processed pursuant to a minor NSR process with a 30 day public comment requirement, or do not involve any single increase that exceeds the applicable threshold for being a major modification and the sum of all increases does not exceed the threshold for determining whether the source is major.⁴⁴⁴ These exclusions do not facilitate the development of market based control strategies and are indicative of the reproposal's emphasis on command, control and enforcement v. facilitating and implementing market based solutions. EPA is reverting to the command and control solutions that were developed in the 1980s. Such prohibitions are at the very least inconsistent with the spirit, if not the law, with which the Act was introduced.

One advantage in the proposal is that it can be used for increases that would constitute Title I modifications if the change has been approved pursuant to NSR and would incorporate all applicable requirements into the Part 70 permit.⁴⁴⁵

The public participation procedure begins with filing an application and requires a source to provide public notice by publication in a prominent newspaper of general circulation, sending letters to individuals on a mailing list, including those who previously participated in any public comment process. This is a case of overreaching by the EPA. Neither section 502(b)(6) nor section 505 require that such procedures be used to provide public notice and comment. Given that less people read today, perhaps the public would be better served if EPA required a television advertisement provision. The notice will state that if no "germane" and "non-frivolous" [defined as those that object to the permit issuance on procedural grounds, or that the source is ineligible for the change based on factual or other relevant information] an objection is received within 21 days of publication of the notice, the source may implement the change.⁴⁴⁶

The permitting authority must keep a record of comments, and issues raised, so that the EPA Administrator can fulfill responsibilities involving citizen petitions.⁴⁴⁷ This provision creates an administrative record for each minor permit revision sought.

If a germane objection is filed, the revision request may be continued under significant permit review provisions, a person whose objection has been ruled not germane can bring a lawsuit in state court to compel action by the permitting authority and obtain an injunction.⁴⁴⁸

The permitting authority may no longer allow a source to proceed with the change immediately upon submitting an application an ability the source enjoyed under the heretofore final rule. Procedures for making changes are at section 70.7(g)(5)(ii). A source can make a change on the 22 day after notice of the change if no public comment is received. If comment is received, the permitting authority must determine within 28 days from the notice period whether the comment is germane or non-frivolous. If the comment

is frivolous or not germane, the source may implement the change on the 29th day. If the source makes the change but before the 60 day period for permitting authority review of the revision application has been concluded and the revision is subsequently rejected, the source is liable for violating the existing permit term.⁴⁴⁹ The EPA has 45 days, effective from when EPA receives notice of the application to review the change.⁴⁵⁰

4. Group Processing of Minor Permit Amendments

While this section of the final rule has been eliminated in the reproposal the threshold provisions considered to be of a de minimis value identified in it are included as options under the new de minimis revision provision.

5. Significant Permit Revisions

Only small changes have been made to the significant permit revision procedure from the significant modification procedures of the final rule provision.⁴⁵¹ This provision remains what operational flexibility was designed to avoid, slow and cumbersome. One change is that new or alternative monitoring methods that have not been approved pursuant to the major or minor NSR are required to be processed as significant permit revisions. This provision will not allow technically advanced or innovative monitoring methods to be implemented until the states have had an opportunity to review them and incorporate into the SIP process.

D. Operational Flexibility Changes Under Authority of Section 502(b)(10)

The reproposal extensively modifies the three provisions that implemented section 502(b)(10) operational flexibility.

First the section 502(b)(10) change,⁴⁵² which allowed changes in contravention of permit requirements is eliminated in the reproposal because of concern that "sources will misunderstand or misuse it."⁴⁵³ The changes that could have been made under this provision can perhaps be made under what was formerly the off-permit rule, reproposal section 70.4(b)(14) but they will now require public notice and comment and permit

revision. Using EPA's example, if a source wants to change a brand of paint specified in the permit, i.e., contravene the permit, it will now be required to utilize permit revision procedures. Small changes may fall under what has been named the Minor Permit Revisions section, *infra*. Permit authorities may respond to this by either writing general permits that do not specify brands of solvents, paints or coatings, just state the emissions limits. Or states can write very stringent permits requiring lots of permit revisions. One suspects that it is the smaller businesses that would include specific brands of solvents in permits, not the manufacturers of the solvent. Thus this change will probably fall hardest upon the auto body shops, dry cleaners and the like.

Trading under an emissions cap, as provided in section 70.4(b)(12)(iii), is still a mandatory component of state operating permit rules.⁴⁵⁴ It has been encumbered by additional provisions and clarifications that enhance enforcement and state prerogative to reject proposed trading schemes. The language permitting establishment of a federally enforceable emissions cap independent of otherwise applicable limits has been struck.⁴⁵⁵ With the loss of this language a source may be bound by existing state applicable requirements regarding emissions trading.

EPA has added a requirement that the permit include any applicable requirements. This will assist enforcement as the permit will contain not only the emissions cap that is intended to avoid application of certain applicable requirements, but the requirements themselves. The permit authority must find that the permittees request for the cap contains adequate terms and conditions to determine compliance with the cap and that the cap is enforceable. The permitting authority is given discretion not to provide in the cap or emission trading provisions any emission units where it determines that the emissions are not quantifiable, no replicable procedures or practical means to enforce the emissions trades. One can envision the dispute over practical means. What is practical for one source may be impracticable for another. This provision will not present a problem if states are reasonable in determining what is practical.

The notice provision is unchanged in the reproposal. The source must still provide the EPA and permitting authority with seven days notice of proposed changes.

Trading under the implementation plan, remains available for use where the SIP allows it.⁴⁵⁶ This trading has been proscribed by limiting it to situations where the permit identifies which permit terms may be replaced with the emissions trading provisions in the implementation plan. This represents a shift in philosophy since the espoused advantage of the provision was its availability to sources that had not anticipated needing to trade emissions within the facility, so as to enable them to take advantage of the emissions trading provisions in the SIP after seven days notice.⁴⁵⁷ The provision would have helped sources that were not sure enough about their needs to warrant writing compliance terms necessary to implement an emissions trading plan in its permit.

E. Alternative Emissions Scenarios

The reproposal leaves intact the requirement that states provide for alternate operating scenarios in permit programs.⁴⁵⁸ Sources may still shift between operating scenarios, contemporaneously recording the shift in a log. Additional language qualifying the notice provision has been added.⁴⁵⁹

For the source to make the change without notice, it must be able to monitor each of the alternative scenarios for a particular unit in such a way that it provides simultaneous measurement and recording of emissions and that the means of measurement are sufficiently different that the contemporaneous record reveals the scenario under which the source was operating when the record was made. Otherwise the permit shall require that the source place in regular mail to the permitting authority notice of changes between scenarios at the beginning of the following week. Because installation of devices that continuously monitor emissions are expensive and would probably be prohibitively so if installed on each emissions unit, this provision converts the no notice alternative scenario into the mail a log next week provision.

In effect, EPA is requiring continuous emissions monitoring⁴⁶⁰ of each unit at the source, if the source wishes to avail itself of the no notice provision. This may prove problematic to EPA. In recognition of the expense of continuous emissions monitoring, section 502(g) of the Act provides that before applying such a requirement to a small business stationary source, the Administrator shall consider the necessity and appropriateness of such requirements.⁴⁶¹ Without a draft preamble it is difficult to determine if the Administrator has made such a finding. It is not in the repropose rule itself, nor in the EPA outline describing the reproposal.⁴⁶² CEM is required for owners and operators of industrial power generating plants by section 412(a) of the Act,⁴⁶³ and enhanced monitoring may be required by the Administrator of persons operating an emissions source under the Act section 114(a)(3). Even enhanced monitoring has not been proposed for every unit at a major source, only those that exceed 30 percent of the emissions rate that would constitute it as a major source.⁴⁶⁴

EPA has sought comment on the need for such a provision and whether less frequent notification is appropriate. Considering that the alternative scenarios and their applicable limits must be included in the permit, one sees little value in requiring such extensive monitoring. One wonders what the permit authority will do with these notifications. This proposed revision cries out for an application of Alabama Power.

F. Off Permit Changes

The elimination of this provision marks the end of the EPA attempt to interject permit philosophy into the Title V operating permit rule. As justification for the elimination of the off-permit provision, EPA stated that it was problematical in that it is at odds with the way states conduct permitting, it is unclear whether a change is addressed by a permit or not, and it created an incentive for a source to request a narrowly drawn permit.⁴⁶⁵ These arguments were not new, all were raised in the public comment period.

The old off permit section has been restructured into something resembling the final rule section 502(b)(10) change,⁴⁶⁶ with a permit revision procedure added.

States may no longer allow increases under the permit that do not violate a permit provision and meet the applicable requirements attributable to the source by the change, to make such a change without obtaining a permit revision. Under the reproposal eligible changes can not result in an increase in the allowable emissions of any regulated air pollutant at the source.⁴⁶⁷ Formerly changes that did not amount to a modification under Title I were allowed. If the change is eligible for the reproposals new minor permit revision procedures, section 70.7(g), it must proceed through public notice that states if no nonfrivolous objection is received within 21 days, the permitting authority may consider that the change was eligible for processing under this paragraph without further opportunity for public comment.

A source is allowed to proceed with the change pending the permit revision process.⁴⁶⁸ By allowing the source to proceed with the change pending review, this aspect of the reproposal is consistent with DoJ guidance that minor permit modification procedures be structured to address operational flexibility concerns. Sources must comply with the new applicable requirements pending permit review.

A significant downside exists for industry, however, which will discourage use of proceeding pending permit review. If the permitting authority or the EPA determines that the change is ineligible for processing under minor permit revision procedures, the source shall be liable from the date the change was made, for failing to apply for a permit revision before the change.⁴⁶⁹ The extent of this liability is not defined, but could conceivably be very large.⁴⁷⁰

Thus it is in the interests of certain environmental organizations to challenge every permit change under this provision where the source has gone ahead with the change pending review. The change will not qualify for the permit shield until after the revision is made.⁴⁷¹

From the permitting authority perspective, enhanced review of changes that heretofore were considered to be of a de minimis nature-in that they did not rise to the level of a Title I modification- will need to be made.

XII. CONCLUSION

Enforcement, not operational flexibility will be enhanced by the changes in the reproposal. A sources ability to make even small increases in emissions without having to file a permit revision and proceed through public notice and comment is eliminated. From the permitting authority perspective additional resources will need to be allocated to perform review of changes heretofore considered to be of a de minimis nature. States seriously considering attracting or retaining business would be well advised to establish an emissions trading scheme in the SIP that meets EPA administrative amendment requirements.

The full import of the reproposal remains to be seen as state permitting programs already approved by EPA will undoubtedly be provided interim status. Nonmajor sources will continue to enjoy deferral from the operating permit program. Recall the EPAs elimination of the off-permit section of the final rule. The elimination of this section more than any other signifies the shift in philosophy at the EPA, from that of its allowed if not prohibited, to its prohibited if not allowed by EPA. Understanding this shift in philosophy at EPA enables one to put the reproposal changes into context.

Based on the legislative history of the Act, the current Administrator's decision on minor permit amendments is no more "correct" than the decision of the previous Administration.

One displeased with this interpretation would do well follow Justice Steven's admonition in Chevron, and take the dispute back to the elected representatives whose failure to appreciate the implications of the modification procedure they were creating caused the operational flexibility controversy.

¹ *EPA Acts to Void Bush Concession to Industry on Clean Air*, Washington Post, July 9, 1994 at A11.

² 40 C.F.R. Part 70 Operating Permit Regulations Proposed Changes, July 8, 1994, Redline/Strikeout version of Part 70. Obtained from EPA bulletin board.

³ Clean Air Act Amendments (CAA), section 502(b)(6), 42 U.S.C. 7661a(b)(6) and section 505(a),(b), 42 U.S.C. 7661d(a),(b), (1990).

⁴ CAA section 502(b)(10), 42 U.S.C. 7661a(b)(10), (1990).

⁵ *Clean Air Implementation Project v. EPA*, 92-1303, (D.C. Cir.), *petition for review*, filed Nov. 12, 1992. Petitions to intervene were subsequently filed by environmental organizations, including Natural Resources Defense Counsel, Sierra Club, and States. These requests were granted and the actions consolidated in the above entitled action.

⁶ 57 Fed. Reg. 32295, (June 1992) (proposed for codification at 40 C.F.R. § 70).

⁷ William F. Pedersen, *Why the Clean Air Act Works Badly*, 29 U. PA. L. REV. 1059, 1981

⁸ Clean Water Act, section 402, 33 U.S.C. 1342, (1992). Section 301 of the Clean Water Act prohibits the discharge of pollutants into U.S. waters except in compliance with a permit. To impose limitations on a discharges into the waters, the Act uses a permit program established at section 402, referred to as the NPDES program. NPDES permits are issued by the EPA unless states are approved to administer the program. Approximately 40 states have this authority.

⁹ Pedersen, *supra* note 7 at 1061.

¹⁰ States are required by CAA section 110, 42 U.S.C. 7410, to adopt implementation plans (SIPs) for attainment of national ambient air quality standards (NAAQS) for each criteria pollutant. Implementation plans are required to contain enforceable emission limitations and other control measures including economic incentives as necessary to meet the NAAQS. The plans and revisions thereto must be submitted to EPA for approval after public comment and hearings.

¹¹ Pedersen, *supra* note 7 at 1061-1062. The double key provision referred to the affirmative action required by two levels of government-one state, one federal to amend rules under the 1977 Clean Air Act. The double key process hampers both changes that are designed to meet present requirements in a more efficient way and housekeeping or mechanical changes.

¹² In 1981, EPA civil referrals to the Department of Justice for violations of the Clean Air Act dropped from 100 in the previous year to 66, and decreased throughout the 1980's as a percentage of all referrals. This phenomena is explained by the difficulty of proving violations of SIPs, proof of which required complicated modeling, and the incorporation into other environmental laws of felony penalties making their use more desirable from a prosecutorial perspective.

¹³ Congress had not been inactive during the Reagan administration. The 98th Congress held hearings on acid rain provisions in H.R. 3400 and hazardous air pollutants, H.R. 5804

in 1983 and 1984. Acid rain was again the subject of hearings in 1985. The 100th congress held hearings on acid rain, nonattainment of air quality standards, depletion of the ozone layer and pollution from municipal waste incinerators.

¹⁴ The Clean Air Act's appropriation authorization, expired in October 1981. See Pub. L. 95-190, section 14(a)(83), 91 Stat. 1404; renumbered section 326, July 2, 1980, Pub. L. 96-300, section 1(c), 94 Stat. 831. See 42 U.S.C. section 7626.

¹⁵ *A Free Market Wrinkle Added By President*, Newsday, March 13, 1989, at 4.

¹⁶ *Bush Panel Agrees to Options To Reduce Air Pollutants*, Washington Post, May 5, 1989, at A3.

¹⁷ Id.

¹⁸ Id.

¹⁹ *Remarks Announcing Proposed Legislation to Amend the Clean Air Act*, Pub. Papers, Administration Of George Bush, (1989) at 706.

²⁰ CAA Subchapter IV, Acid Deposition Control, 42 U.S.C. 7651-7651o.

²¹ The White House task force that developed the legislation reportedly included representatives from EPA, DoE and White House staff. The President also praised Project 88, a study headed by Harvard professor Robert N. Stavins, conducted for Senators John Heinz (R-Pa) and Tim Wirth (D-Colo) which found that pollution could be reduced by some kind of permit banking, trading or selling, and the Environmental Defense Fund in his June 12, 1989 remarks, for helping to break the mold.

²² *White House Fact Sheet on the Presidents Clean Air Act Plan*, Pub. Papers, Administration of George Bush, (June 12, 1989) at 708.

²³ *Remarks on Transmitting to the Congress Proposed Legislation to Amend the Clean Air Act*, Pub. Papers Administration of George Bush (July 21, 1989) at 997.

²⁴ S.Hrg 331, The 1989 Clean Air Act Amendments, 101st Cong., 1st Sess. (Sep. 26, 1989) (testimony of Wm. Reilly, Administrator, EPA) at 78.

²⁵ Id.

²⁶ H.R. 3030, 101st Cong., 1st Sess. (July 27, 1989) reprinted in S. Rpt. 103-38, Committee on Environment and Public Works, 103 Cong., 1st Sess., A Legislative History of the Clean Air Act Amendments of 1990 (1993) (*hereinafter* A Legislative History of the Clean Air Act Amendments) at 3737.

²⁷ 135 Cong. Rec. H4452 (daily ed. July 27, 1989). Primary sponsors of H.R. 3030 were Representatives John D. Dingel, Chairman of the House Energy and Commerce Committee and Norman F. Lent, the ranking minority member of the committee.

²⁸ H.R. 3030, section 401, 101 Cong., 1st Sess. (July 27, 1989) *supra* note 26 at 3946. Section 402(a) gave the EPA Administrator discretion to exempt one or more source categories from the requirement to obtain a permit if such an exemption would be consistent with the purposes of the Act. This discretion would become a point of contention during the rulemaking as states sought EPA exercise of discretion. In a

December 1989 draft of the regulations to implement the Act's permitting provisions, EPA left to the states the burden of justifying these exemptions.

²⁹ An area source is any stationary source that is not a major source. It does not include motor vehicles or non road engines. See CAA section 112(a)(2), 42 U.S.C. 7412(a)(2).

³⁰ The EPA sets new source performance standards (NSPS) by promulgating proposed standards of performance-standards for emissions control reflecting the degree of emission limitation achievable through the application of the best system of emission reduction which the Administrator has determined adequately demonstrated-considering cost, non air quality impacts and energy requirements, for sources in particular categories. After the list is promulgated the sources within the particular classification or category the performance standard must use that standard of control on new sources of emissions. A modification can result in an old unit being treated as a new one and therefore having to comply with the NSPS. See Wisconsin Electric Power v. Reilly, 893 F.2d 901, (7th Cir.1990).

³¹ Section 402, *supra* note 25, 3947.

³² Section 402(b)(6), *supra* note 25, 3953.

³³ Section 402(b)(7), *supra* note 25, 3953.

³⁴ Section 404(c) *supra* note 25, 3954.

³⁵ Section 405(a) *infra* note 25 at 3963.

³⁶ Sec. 405(b) *supra* note 25 at 3965.

³⁷ Section 404(f) *supra* note 25, 3961.

³⁸ This provision is modeled after Clean Water Act section 402(o), 33 U.S.C. 1342(o).

³⁹ Section 404(f) *supra* note 25 at 3961.

⁴⁰ Section 405(b) *supra* note 25 at 3964, gave the EPA 90 days from receipt of the permit modification for review. Prompt changes in permits were precluded by this provision.

⁴¹ H.Rept No. 490, 101st Cong., 2d Sess.(May 1990), *reprinted in* a Legislative History of the Clean Air Act Amendments of 1990, at 3365.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ H.Rept. No. 490, *supra* note 41, p. 3367.

⁴⁵ H.Rept. No. 490, *supra* note 41, p. 3116.

⁴⁶ H.R. 3030, section 402(b)(6), H. Rept. No. 490, *supra* note 41, p. 3369.

⁴⁷ H. Rept. No. 490, *supra* note 41, p. 3375.

⁴⁸ S. 1490, 101 Cong., 1st Sess, (1989).

⁴⁹ S. 1630, 101 Cong., 1st Sess., (1989), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, p. 7906.

⁵⁰ S. Rept. 228, Committee on Environment and Public Works, 101st Cong., 1st Sess., (1989), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, p. 8687.

- ⁵¹ Id.
- ⁵² Clean Water Act, 33 U.S.C. 1251 et. seq.
- ⁵³ Resource Conservation and Recovery Act, 42 U.S.C. 6901 et. seq.
- ⁵⁴ S.Rpt 228, 101 Cong., 1st Sess., (1989) *reprinted in* A Legislative History of the Clean Air Act Amendments, P.L. 101-549, at 3738.
- ⁵⁵ S.Rpt. 228, 101 Cong., 1st Sess., (1989) *reprinted in* A Legislative History of the Clean Air Act Amendments, P.L. 101-549, at 3738.
- ⁵⁶ S.Rpt, 228, 101 Cong., 1st Sess., Minority views, (statement of Sen. Symms) (1989) *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, p. 8755.
- ⁵⁷ S.Rpt, 228, 101 Cong., 1st Sess., Minority views, (statement of Sen. Symms) (1989) *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, p. 8755.
- ⁵⁸ S.Rpt, 228, 101 Cong., 1st Sess., Minority views, (statement of Sen. Symms) (1989) *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, p. 8755.
- ⁵⁹ Section 354(e)(1), S. 1630, 101 Cong., 2d Sess., (1990) *as reprinted in*, A Legislative History of the Clean Air Act Amendments of 1990, p. 7817.
- ⁶⁰ See text discussion *supra* p 12.
- ⁶¹ Note 59 *supra* at 7818.
- ⁶² S. 1630, section 354(e)(2), note 59 *supra* at 7818.
- ⁶³ Id. at 7813.
- ⁶⁴ Section 354(a)(1)(B), S. 1630, Am. 1293, 101 Cong. 2nd Sess, (1990), 7814.
- ⁶⁵ 136 Cong. Rec. S5315, (daily ed. March 26, 1990).
- ⁶⁶ S. Debate on S. 1630, 101 Cong. 2d Sess., *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, (March 26, 1990) (remarks of Sen. Nickles) at 6325, 6326.
- ⁶⁷ Id. at 6336.
- ⁶⁸ S. Debate on S.1630, Am. 1456, 101st Cong., 2d Sess., *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, (Remarks of Senator Dole) at 7143.
- ⁶⁹ Id. at 7145.
- ⁷⁰ See note 66 *supra* at 6340.
- ⁷¹ Remarks of Sen. Nickles (March 26, 1990), See note 69, *supra* at 7145.
- ⁷² Compare Bacus-Chafee Amendment 1293, section 354, *supra* p. 12 to Nickles-Heflin-Dole amendment 1373, section 351(b)(10), (A) If a permit applicant identifies the composition of emissions under the reasonably anticipated operating conditions of the permitted facility, the permit shall set forth the emission limitations, standards and other requirements that would apply under all such reasonably foreseeable anticipated operating conditions, (B) The emissions limitations and other permit terms shall allow the owner or operator of a facility to make changes in the operation of the facility that might shift permitted emissions from one source to another within the same facility, as authorized by

a codifying or modifying permit without the necessity for a permit modification, provided that the owner or operator provides written notification specifying changed permit requirements to the permitting authority not less than 7 days prior to any such change...

⁷³ Am. 1373, section 351(b)(6), emp.add. 136 Cong.Rec. S5316, (daily ed. March 26, 1990).

⁷⁴ Am.1456, section 351(b)(8), S. 1630, 136 Cong. Rec. 6558 (daily ed. April 3, 1990).

⁷⁵ S. 1630, Am. 1293, 101st Cong., 2nd Sess.(1990), *reprinted in*, A Legislative History of the Clean Air Act Amendments of 1990, at 4701.

⁷⁶ S. 1630, Am.1456, section 351(b)(6), 136 Cong.Rec. S6558, (daily ed. April 3, 1990).

⁷⁷ Codifying permits attempted to remove the burden of the dual regulatory process, having a source meet requirements of both a permitting program and the SIP, by placing permits whose sole purpose was to codify or carry out provisions of the SIP, outside the purview of the courts for purposes of judicial review. Codifying permits would implement, and not change any material requirement of an implementation plan. Modifying permits did not implement SIP requirements. Codifying permits, unlike modifying permits, did not have to be reviewed by the EPA. Modifying permits were also to be submitted to all states whose air quality would be affected by the permit. Only permits that modify the SIP would be subject to judicial challenge. See Nickles Am. 1373, section 354, 136 Cong. Rec. 5317, (daily ed. March 26, 1990).

⁷⁸ See section 354(a), Am. 1293, S. 1630, 101 Cong., 2nd Sess., (1990) *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, 7813, and section 354, Am. 1373, S. 1630, 135 Cong. Rec. S5317 (daily ed. March 26, 1990)

⁷⁹ Gwaltney of Smithfield LTD. v. Chesapeake Bay Foundation Inc., 108 S.Ct 376 (1987). Citizens may only sue for violations that are alleged to be continuous or recurrent at the suit is filed. They have no jurisdiction to bring a suit under the Clean Water Act for alleged violations that occurred entirely in the past.

⁸⁰ See note 66, *supra* at 7151.

⁸¹ 136 Cong. Rec. H2833(daily ed. May 23, 1990). These were part of a block of amendments offered by Cong. Dingell and were referred to as the Energy and Commerce Committee Amendments. The Dingell amendments contined compromise language regarding protection of National Parks, accidental releae of hazardous pollutants into the air, reformulated gas standards and transportation plan provisions.

⁸² H.Rpt. 952, Clean Air Act Amendments of 1990, 101 Cong., 2d Sess. (Oct 26, 1990), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, 1451.

⁸³ 42 U.S.C. 7416, provides in part "[N]othing in this chapter shall preclude or deny the State or political subdivision thereof to adopt or enforce any standard or limitation respecting emissions of air pollutants or any requiremnt respecting control or abatement or air pollution...."

⁸⁴ 101 Cong. 2d Session, Rpt 101-952, Conf. Rpt. to accompany S. 1630, *reprinted in* Legislative History of the Clean Air Act Amendments, p 1795.

⁸⁵ *Id.* section 502(b)(6) at 1702.

- 86 See the de minimis regulations at 40 C.F.R. § 52.21(b)(23).
- 87 H.Rpt 952, 101 Cong. 2d Session, Conf. Rpt. to Accompany S. 1630, *reprinted in*, A Legislative History of the Clean Air Act Amendments of 1990, at 1795.
- 88 Sen. Debate on Conf. Rpt. 952, 101st Cong., 2d Sess. (Oct. 27, 1990) *reprinted in*, A Legislative History of the Clean Air Act Amendments of 1990, p 909.
- 89 *Id.* at 915.
- 90 *Id.*
- 91 See note 72 *supra*.
- 92 See note 26 *supra* at 3964. Note H.R. 3030 is the Bush Administration's proposal which did not include public notice or comment in section 405. It also provided to the EPA Administrator a waiver to exempt even major sources by category from the notification and transmission requirements.
- 93 See WEPCO note 30 *supra*.
- 94 See 40 C.F.R. § 52.21(b)(23).
- 95 Section by section conference committee analysis, S. Debate, S. 1630 (Oct. 26, 1990), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, at 905.
- 96 House Debate, S. 1630, (Oct 26, 1990) *Id.* at 1243.
- 97 *President's Statement on Signing S. 1630 Into Law*, Pub. Papers (11/15/90) p. 727.
- 98 42 U.S.C. 7607(d), A proposed rule must be published in the Federal Register accompanied by a statement of its basis and purpose and must specify a period of public comment. The statement of purpose is required to contain the factual data on which the rule is proposed, and the major legal interpretations and policy considerations underlying the rule. The promulgated rule must be accompanied by a response to each significant comment, criticism and any new data submitted in written or oral presentations during the comment period.
- 99 Section 307(d)(7)(B), 42 U.S.C. 7607(d)(7)(B). The record for judicial review consists exclusively of written comments in the docket, EPA's statement of basis and purpose, explanation of the reasons for any major changes in the promulgated rule from the proposed rule, responses to significant comments, criticisms, and new data submitted during the comment period. See section 307(d)(7)(A), 42 U.S.C. 7607(d)(7)(A).
- 100 See State of Ohio v. U.S.E.P.A., 997 F.2d 1520, (U.S.C.A. D.C. Cir, 1993), wherein challenges to a part of the Preamble to the National Contingency plan, 40 CFR Part 300 were dismissed as not having been properly brought before the agency, thus foreclosing review.
- 101 See index, EPA rulemaking docket A-90-33.
- 102 See note 293 *infra*.
- 103 *Lawmaker Hits White House on Clean Air Act Tardiness*, The Oil Daily, Pg 1, February 10, 1992.

104 Alan W. Eckert, *What You Need to Know About the New Clean Air Act: Operating Permits: The New Program Strategy*. EPA Journal, (Jan 1992). The author was an Associate General Counsel for Air and Radiation.

105 42 U.S.C. 7661a(b).

106 42 U.S.C. 7661a(b)(1).

107 42 U.S.C. 7661a(b)(2).

108 42 U.S.C. 7661(b)(3)(B)(i).

109 42 U.S.C. 7661(b)(5)(B).

110 42 U.S.C. 7661a(b)(6).

111 Organizations represented in the Roundtable include the Sierra Club, State, Motor Vehicle Manufacturers Association, Chemical Manufacturers Association, Vermont Air Pollution Control District, Environmental Defense Fund, Natural Resources Defense Counsel, SOCMA, NEDA, NAM, Swidler & Berlin, Andrew & Kurth, see EPA, Office of Policy Analysis and Review (ANR-443), Memorandum, Dec 31, 1990, Subject: Preliminary Draft of the Proposed Regulations for Operating Permit Programs.

112 CAA section 502(d), 42 U.S.C. 7661a(d). As of January 10, 1994, 34 States and 18 of 34 California air districts had submitted programs.

113 Proposed 40 C.F.R. § 70.2, A-90-33, II-F-1 (12/21/90).

114 Proposed 40 C.F.R. § 70.3, A-90-33 (12/21/90).

115 EPA estimated the number of nonmajor sources at 350,000 in its deferral justification, See A-90-33, V-C-1, (July 24, 1992) at 3-10.

116 Nonmajor sources include sources subject to the permitting requirement in CAA section 502, that do not emit pollutants at the level of that defines major sources under section 112 of the Act, as noted in proposed section 40 C.F.R. 70.3. Sources subject to the new source performance standards under CAA section 111(a)(3), include buildings, structures and installations which emit any air pollutant, regardless of whether they are "major" sources or not. The EPA Administrator proposes standards of performance for new or modified sources by industrial categories [new source performance standards] section 111(b). Under section 112 of the Act, area sources, sources of hazardous air pollutants that are not major sources, and stationary sources as defined in section 111(a) of the Act, are regulated and must meet utilize control technology specified for the particular industrial category the source is included in. An oft cited example of such a source is a dry cleaning establishment. Even though such a source is not considered major in that it does not emit ten tons of one hazardous air pollutant or 25 tons of an aggregate of pollutants, it will be regulated when EPA promulgates rules regulating this source category it falls under.

117 Proposed 40 C.F.R. § 70.3(b), draft (12/21/90), A-90-33, II-F-1.

118 CAA section 111, 42 USC 7411, See 40 C.F.R. § 60.

119 CAA section 112, 42 USC 7412, See 40 C.F.R. § 51.

120 Proposed 40 C.F.R. § 70.3(b), Draft (12/21/90), A-90-33, II-F-1.

121 Proposed preamble, Draft (12/21/90), A-90-33, II-F-1 at 41-43.

122 CAA section 112(a)(1), defines a major source as one that has the potential to emit 10 tons per year of any one or 25 tons per year of a combination of hazardous air pollutants. Area sources under section 112(a)(2) can include stationary sources that emit less than the major source threshold limits. It is this second group of sources that EPA choose to defer application of the air permit rule. Note a major source in an extreme nonattainment area could emit as little as ten tpy. Under the 1990 Act, the NESHAP standards moved from health based standards to technology standards regulated by industrial categories. At the time of draft, EPA had not promulgated any maximum available control technology requirements for source categories. Thus the deferral would become first become effective for nonmajor sources subject to these requirements in the future when promulgated.

123 Note 121, *supra*.

124 Summary of OMB Comments on Title V Operation Permits, and Responses, A-90-33, IV-B-2.

125 56 Fed. Reg. 21712, (to be codified at 40 C.F.R. pt. 70)(proposed 5/10/1991).

126 56 Fed. Reg. 21769, (to be codified at 40 C.F.R. § 70.2(r))(proposed 5/10/91).

127 56 Fed. Reg. 21770, (to be codified at 40 C.F.R. § 70.3(b)) (1991).

128 A-90-33, IV-D-52, Mobil (7/3/91).

129 A-90-33, IV-D-77, A. Ellet, BP Oil, (6/28/91)

130 A "bubble" is an imaginary boundary device placed over a polluting plant or other facility containng many individual sources of air emissions. Instead of regulating emissions from each source, the air permitting authority regulates only the total pollution of the plant, as if the pollution were coming from a single imaginary outlet in the bubble. In Chevron v. Natural Resources Defense Counsel, 467 U.S. 837 (1984), the Supreme Court upheld EPA's use of a bubble. For expansion of Chevron see note 293 *infra*.

131 A-90-33, IV-D-101, P.King, PPG Industries, (7/3/91).

132 See note 128 *supra*.

133 A-90-33, IV-D-169, J.Greenberg, Browning-Ferris Industries, (7/8/91).

134 See discussion of four v. two digit SIC code in text at page 27 *infra*.

135 A-90-33, IV-D-148, California Air Pollution Control Officers Association (7/8/91).

136 A-90-33, IV-D-177, Steel Mfgs Assoc., Collier, Shannon & Scott, (7/9/91).

137 A-90-33, IV-D-170, Group Against Smog and Pollution called nonmajor sources the crackhouses of air pollution.

138 A-90-33, IV-D-360, Department of Defense comments (7/8/91).

139 For a thorough discussion of how stationary source designations in the SIC code adversely impact Air Force operations, see *Stationary Source Designations at Major Military Installations, The Clean Air Act's Mission Killer*, Federal Facilities Environmental Journal, Winter 1991/92, Vol 2, Number 4.

140 Docketing of Detailed Responses to Comments on the Part 70 Operating Permit Regulations, A-90-33, V-C-1, at p 3-6 notes 34 industry representatives, six state groups, and one government agency supported the exemption. Two environmental groups argued there should be no exemption for small or nonmajor sources unless there is a specific finding that it would be impracticable, infeasible or unduly burdensome for the source to comply with the Acts requirements.

141 The Oklahoma Chamber of Commerce & Industry noted in comments submitted to EPA during the pendency of the rulemaking, A-90-33, IV-D-108, that there are 363,000 manufacturing facilities in SIC codes 20-39. Some 65% of these have fewer than 20 employees, 90% have less than 100. EPA estimated as many as 350,000 nonmajor sources could conceivably enter the permit process absent the deferral.

142 Alabama Power Co. v. Costle, 636 F.2d 360 (D.C. Cir. 1979) as cited in A-90-33, V-C-1, (7/24/90) 3-10.

143 Section 70.3(b), 57 Fed. Reg. 32297 (1992).

144 A-90-33, V-C-1, Summary of Comments on Section 70.3, 7/24/91.

145 Executive Office of the President, Office of Management and Budget, *Standard Industrial Code Manual 1987*, Appendix B, p 699.

146 A-90-33, V-C-1, Response to Comment Document at 3-1,3 (7/8/92).

147 A-90-33, V-C-1, Response to Comment Document at 3-2, (7/8/92). Any equipment used to support the main activity at a site would also be considered part of the same major source, regardless of the two digit SIC code for that equipment. For example, an automobile manufacturing plant may consist of a foundry (SIC Group 33), a power plant (SIC Group 49) and an assembly plant (SIC Group 37). Assume that the equipment is situated at the same site, under common ownership, and that the foundry and power plant are used solely to support the assembly plant. In this example, all three activities would be considered to be part of one source. However, if less than 50 percent of the output of the foundry was dedicated to the mentioned auto assembly plant, it would be considered a separate source. If the power plant supported both the foundry and the assembly plant, it would be considered a part of the source that consumed the largest percentage of the power generated. Thus a single plant would not be required to have multiple permits even if it supported several different installations. Aggregation by SIP code should be done in a manner consistent with established NSR procedures. See NSR Workshop Manual, Draft Oct 90.

148 See note 149 *infra*.

149 A-90-33, V-C-1, p 3-7.

150 A-90-33, V-C-1, p 3-2.

151 See text Public Comment *infra* at 42.

152 See CAA section 502(b)(10), 42 U.S.C. 7661a(b)(10).

153 Section 70.6(d), Draft (12/21/90), A-90-33, II-F-1.

154 CAA section 111(a)(4), 42 USC 7411(a)(4)

- 155 42 U.S.C. 7479(2)(C), 42 U.S.C. 7501(4).
- 156 For a detailed list of modification exemptions for nonattainment areas see, 40 C.F.R. § 51.165. For exemptions for attainment areas, see 40 C.F.R. § 51.166.
- 157 CAA section 112(g)(1), 42 USC 7412(g)(1).
- 158 See 40 C.F.R. § 60.14, and § 61.15.
- 159 See footnote 6, 56 Fed. Reg. 21747 (1991).
- 160 Section 70.7(d)(3)(ii), Draft (12/21/90), A-90-33, II-F-1.
- 161 CAA section 169(3), 42 U.S.C. 7479(3), best available control technology means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case by case basis, taking into account, energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.
- 162 Proposed preamble, Draft (12/21/90), A-90-33, II-F-1, p 91.
- 163 A-90-33, II-F-1, p 26.
- 164 Section 70.7(e), Draft (12/21/90), A-90-33, II-F-1.
- 165 Section 70.2, Draft (12-21-90), A-90-33, II-F-1.
- 166 Draft Preamble, Draft (12-21-90), A-90-33, II-F-1 p. 24.
- 167 Section 70.2, Draft (12-21-90), A-90-33, II-F-1.
- 168 Preamble, Draft (12/21/90), A-90-33, II-F-1 p 29.
- 169 Section 70.2, Draft (12/21/90), A-90-33, II-F-1.
- 170 Preamble, Draft (12/21/90), Permit Issuance and Review, A-90-33, II-F-1.
- 171 42 U.S.C. 7661a(b)(6).
- 172 Section 70.7(h), draft (12/21/90) A-90-33, II-F-1.
- 173 Public Participation in Permit Issuance, Draft (12-21-90), 40 C.F.R. § 70.7(h)(1-5).
- 174 Section 70.6(d) defined the minimum permit requirements, Draft (12/21/90), A-90-33, II-F-1.
- 175 Id.
- 176 Preamble (12/21/90), A-90-33, II-F-1, at 94.
- 177 Id. at 95.
- 178 Id. at 95.
- 179 Id. at p 96.
- 180 Menefee, California Air Resources Board, 1/9/90, A-90-33, II-D-11. Note: California's response was addressed, per EPA request, to a representative of the State and

Territorial Air Pollution Program Administrators (STAPPA) which acted as a collection point for state comments.

181 Price, Texas Air Control Board, (1/8/91), A-90-33, II-D-8.

182 State of New Jersey, Dept. of Env. Protection, Div. of Env. Quality, A-90-33, II-D-5.

183 42 U.S.C. 7661a(b)(10).

184 Section 70.7(h) Public Participation, 12/21/90 draft, A-90-33, II-F-1.

185 note 180 *supra*.

186 Price, Texas Air Control Board, 1/8/91, A-90-33, II-D-8.

187 Syntheric Organic Chemical Manufacturers Association, Inc., January 9, 1990, comments on proposed regulation and preamble, A-90-33, II-D-9.

188 National Environmental Development Association, January 9, 1991, comments on 12-21-90 draft regulation and preamble, A-90-33, II-D-18.

189 *Id.*

190 Summary of OMB Comments On Title V Operating Permits, A-90-33, IV-B-2.

191 *Id.*

192 *Id.*

193 56 Fed Reg 21714, (1991).

194 56 Fed. Reg. 21712, (Proposed for codification at 40 C.F.R. § 70) (proposed May 10, 1991).

195 Preamble II, F, 56 Fed. Reg. 21714 (1991).

196 For state concerns see comments in text *supra* at p 34.

197 Note 195 *supra* at 21714.

198 56 Fed. Reg. 21776, (1991).

199 Preamble discussion, 56 Fed. Reg. 21746 (1991).

200 Perhaps this philosophy represented an attempt by EPA to interject Hegelian analysis into the permit modification procedure in an attempt to develop a new theory.

201 56 Fed. Reg. 21746 (1991).

202 Section 70.6(d)(3)(iv), 56 Fed. Reg. 21776 (1991).

203 Preamble, 56 Fed Reg 21718 (1991).

204 56 Fed Reg 21746, (1991).

205 56 Fed. Reg. 21748, (1991).

206 Section 70.6(d)(3)(i), 56 Fed. Reg. 21776, (1991).

207 56 Fed. Reg. 21748-21749, (1991).

208 *Id.*

209 A-90-33, II-F-1, Draft 12/21/90, at 94.

210 56 Fed. Reg. 21776, (1991).

211 56 Fed. Reg. 21777, (1991).

212 56 Fed. Reg. 21746, (1991). Title I includes several different definitions of "modification" for purposes of different programs. For purposes of the new source performance standards (NSPS) the statutory definition of modification is found at (sic) [1]11(a)(4), and EPA's implementing regulations are found at 40 C.F.R. § 60.14. For nonattainment new source review (NSR), see sections 171(a)(4), 182(c)(6) and 182(c)(7) of the Act as well as 40 C.F.R. § 51.165(a)(1), § 51.165(a)(1)(x) in particular exempts from treatment as a modification (for NSR purposes) a change resulting in a net emissions increase below the following levels: carbon monoxide, 100 tons per year; nitrous oxides, sulfur dioxide and VOC, 40 tpy, lead 0.6 tpy. New section 182 of the Act, however, now sets lower de minimis levels for various ozone nonattainment classifications..."

213 56 Fed. Reg. 21777 (1991)

214 *Id.*, 70.7(f)(2).

215 56 Fed. Reg. 21747, (1991).

216 See discussion text page 12 *supra*.

217 56 Fed. Reg. 21768, Proposed section 40 C.F.R. §70.7(f).

218 This is the provision the State of Texas was asking for in its comments on the 12/21/90 draft, See A-90-33, II-D-8.

219 56 Fed. Reg. 21777, (1991).

220 56 Fed. Reg. 21747, (1991).

221 56 Fed. Reg. 21748, (1991).

222 56 Fed. Reg. 21777, (1991).

223 A-90-33, IV-D-252, Howard Fox, Sierra Club Legal Defense Fund, Inc., (7/9/91).

224 *Id.*

225 A-90-33, IV-D-158, David Hawkins, Natural Resources Defense Counsel, (7/9/91).

226 Russian Field Marshal Grigori Aleksandrovich Potemkin, 1739-1791, a favorite of Catherine the Great, was said to have constructed fake villages to deceive Catherine the Great about his accomplishments. A *potemkin* village is defined as a false front or facade, Webster's New World Dictionary, Third College Edition, Copyright 1988, Simon & Schuster.

227 Note 225 *supra*.

228 A-90-33, IV-D-183, Peter Baljet, American Lung Association, (7/9/91).

229 56 Fed. Reg. 21776 (1991), Proposed 40 C.F.R. § 70.6(d)(3)(i) provided for issuance of a permit that would identify reasonably anticipated operating scenarios.

230 A-90-33, IV-D-170, Group Against Smog and Pollution, (7/9/91).

231 See note 225, *supra*.

232 The provisions referred to contained an "Anti-back sliding" provision modeled after Clean Water Act section 402(o), 33 U.S.C. 1342(o). An assertion that removal of this

provision reflects Congress' intent to limit increased emissions without full permit modification would seem misplaced. More likely this provision was removed in recognition of the distinction between the number of emission points covered in a NPDES permit and anticipated under the federal permit system. At the time Senate Bill 1630 included this section it did not contain the operational flexibility provision. When operation flexibility was added 404(f) was dropped, possibly suggesting the converse of NRDC's assertion.

233 A-90-33, IV-D-101, Paul M. King, PPG Industries, (7/3/91).

234 A-90-33, IV-D-209, National Environmental Development Association (7/9/91).

235 See note 307 *infra*.

236 A-90-33, IV-D-160, Motor Vehicle Manufacturers Association (MVMA), (7/9/91). The MVMA a trade association for seven companies manufacturing automobiles with 300 manufacturing facilities in 35 States.

237 A-90-33, IV-D-182, International Business Machines Corp, (6/28/91).

238 A-90-33, IV-D-184, Texaco, (7/8/91).

239 Ultimately this is exactly what transpired after the 1992 presidential election and a new EPA Administrator, Carol Browner was named to succeed William Reilly. President Clinton disbanded the council on competitiveness, and industry lost its ally in the White House.

240 56 Fed. Reg. 21776 (1991), Proposed 40 C.F.R. § 70.6(d)(3)(i) and (iv).

241 See text at 42 *supra*.

242 A-90-33, IV-D-184, Texaco, (7/8/91).

243 A-90-33, IV-D-115, Exxon Chemical, (7/5/91).

244 A-90-33, IV-D-122, The Procter & Gamble Company, (7/8/91).

245 A-90-33, IV-D-122, The Procter & Gamble Company, (7/8/91).

246 IBM noting that some of its facilities have more than 5000 chemicals approved for use, sought from EPA a "clear statement indicating that neither final approval nor interim approval will be granted to state programs that do not allow changes to manufacturing operations without the need to revise a permit and for expeditious reviews. A-90-33, IV-D-182, IBM, (6/28/91).

247 A-90-33, IV-D-209, National Environmental Development Association (7/9/91).

248 A-90-33, IV-D-93, Jonathon Greenberg, Director of Environmental Policy, Browning-Ferris Industries, (7/8/91).

249 A-90-33, IV-D-126, Merck (7/9/91).

250 IV-D-204, Clean Air Act Implementation Project (CAIP), (7/9/91). Members included major industrial corporations which joined to focus on selected group of issues. Members include Allied-Signal, BASF Corporation, Digital Equipment Corp, General Electric, Kaiser Aluminum, Olin Corp, Pfizer Inc, United Technologies among others. This is the organization that later challenged EPA's operating permit rule. See page .

251 *Id.*

252 *Id.*

253 A-90-33, IV-D-160, Motor Vehicle Manufacturers Association (MVMA), July 9, 1991.

254 See *Chevron* at 856, note 293 *infra*.

255 A-90-33, IV-H-6, Office of the Vice President, (April 6, 1991). The Office of the Vice President collected changes from the White House Counsel's office and the Office of Policy Development in OMB on permitting rule drafts.

256 The record of the proceedings before the panel is at A-90-33, IV-F-01. The panel was composed of Hearing Officer Mike Trutna, office of Air Quality, Planning and Standards, Kate Fay, Office of Assistant Administrator for Air and Radiation, Tim Williamson, Office of Policy Analysis and Review, Kendra Sagoff, Office of General Counsel. Testimony was presented on behalf of the National Association of Manufacturers, Sierra Club, NRDC, New York State Department of Environmental Conservation, and the Pennsylvania Chemical Industry Council among others.

257 *Id.*

258 A-90-33, IV-D-270, William Becker, State and Territorial Air Pollution Program Administrators, 7/9/91. Its written comments did not address the interaction of the minimum requirements language in section 502 with section 116, despite being asked to do so at the hearing.

259 EPA's permit philosophy is at proposed section 40 C.F.R. § 70.6(d)(3)(iv), 56 Fed. Reg. 21776, (1991).

260 A-90-33, IV-D-192, July 8, 1991, Northeast States for coordinated Air use Management (Nescaum) members represent air pollution control agencies in eight Northeastern.

261 A-90-33, IV-D-179, July 9, 1991, State of California Air Resources Board

262 A-90-33, IV-D-123, P. Greenwald, South Coast Air Quality Management District, (7/8/91).

263 A-90-33, IV-D-179, July 9, 1991, State of California Air Resources Board

264 Note 260 *supra*.

265 John R. McKernan, Jr., Governor, State of Maine, ltr to Wm Reilly, EPA Administrator, A-90-33, IV-C-59 (7/31/90).

266 Note 270 *infra*.

267 A-90-33, IV-D-192, July 8, 1991, Northeast States for coordinated Air use Management (Nescaum) members represent air pollution control agencies in eight Northeastern.

268 *Id.*

269 *Id.*

270 A-90-33, IV-D-179, July 9, 1991, State of California Air Resources Board

271 56 Fed. Reg. 21776, proposed 40 C.F.R. § 70.6(d)(2) permits a state to allow changes that would increase emissions above a level allowed in the permit if such change not a modification under Title I using procedures under 70.7(f).

272 Reasonable further progress means such annual incremental reductions in emissions of the relevant air pollutants as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date. CAA section 171, 42 U.S.C. 7501(1).

273 A-90-33, IV-D-125, July 9, 1991, Texas Air Control Board comments on the operating permit program. It was one of the only states to congratulate EPA on its preparation of the permitting regulation in such a short time. Previously Texas submitted comments to EPA as part of the roundtable. See A-90-33, II-D-8.

274 Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152.

275 Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309.

276 See text page 57 *infra*.

277 CAA Section 502(a), 42 U.S.C. 7661a(a).

278 CAA Section 505(a)(1), 42 U.S.C. 7661d(a)(1).

279 CAA Section 505(b), 42 U.S.C. 7661d(b).

280 Of the general counsel's conclusions, this is the least defensible. The cases cited as authority for this proposition, Kansas City v. H.U.D., 923 F.2d. 188, (D.C. Cir. 1991), Matthew v. Eldridge, 424 U.S. 319, (1976) involved the procedural protections to be afforded a person before being deprived of government benefits, and were based on the constitutional due process clause, which relates to deprivations of liberty or property rights. See the DoJ memo, A-90-33, IV-G-70.

281 Hearing of the Health and Environment Subcommittee of the House Energy and Commerce Committee, Subject Clean Air Act, Witness, William Reilly, Administrator, EPA, Federal News Service, November 14, 1991.

282 *Id.*

283 *Id.*

284 *De Minimis Provision Dropped From Permit Rule*, Environmental Reporter, 2/14/92, at 2363.

285 *Small Increase Should Not Trigger Review Group Says Supporting De Minimis Provisions*, Environmental Reporter, 2/21/92, p 2404.

286 56 Fed. Reg. 21777, (1991).

287 Alabama Power Co. v. Costle, 636 F.2d. 323, (D.C. Cir. 1979), held *de minimis* exceptions should be inferred "save in the face of the most unambiguous demonstration of congressional intent to foreclose them."

288 After the close of the public comment period July 15, 1991, information contained in the administrative record is not helpful as the forum in which the rulemaking discussion was occurring shifted from the EPA to the Office of Management and Budget and White

House. These organizations were not required by CAA section 307(d) to place their comments in the administrative record as part of the rulemaking. Subsequently Senator John Glenn proposed legislation, S. 1942, that would have required OMB and the council on competitiveness to keep public logs of contacts and communications made while reviewing the rules.

289 *State, Environmentalists Say They May Sue EPA To Force CAA Permit Req.*, Inside EPA, 2/14/92, p. 8. States were becoming concerned that they would be unable to meet the November 15, 1993 requirement that their operating permits be in place. They were relying upon issuance of the EPA final rules to seek the legislative and regulatory changes that would be necessary to implement a permit program in accordance with EPA requirements.

290 Barry M. Hartman, Acting Assistant Attorney General, U.S. DoJ, Environment and Natural Resources Division, Memorandum For William K. Reilly, Administrator, EPA, May 27, 1992. This letter though stamped attorney client privileged was obtained and offered by the NRDC placed into the air docket by the NRDC at A-90-33, IV-G-70.

291 *Public Citizen v. Young*, 831 F.2d 1108 at 1113, (1987). Failure to employ a de minimis doctrine may lead to regulation that not only is "absurd" or "futile" in some general cost benefit sense, but is also directly contrary to the primary legislative goal. The court stated, "Unless Congress has been extremely rigid, there is likely a basis for an implication of de minimis authority to provide an exemption when the burden of the regulation yields a gain of trivial or no value. *Alabama Power* 636 F.2d at 360-361." In *Public Citizen*, there was evidence that Congress was so rigid, that it had determined that the public could do without carcinogenic colors, especially in view of the safer substitutes available. Considering the great concern - risk of cancer - over a specific health threat, low cost of protection, possibility of remedying any mistakes, Congress' enactment of an absolute rule seems less surprising concluded the court.

292 See note 290 *supra*.

293 *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 81 LEd.2d 694, (1984). In *Chevron* the NRDC filed a petition to review EPA regulations 40 CFR 51.18(j)(1) that allowed states to treat all of the pollution emitting devices within the same industrial grouping as though they were emitting through a single point, a "bubble." The U.S. Court of Appeals for the District of Columbia set aside the regulations, holding that the concept of a bubble was inappropriate in a program enacted to improve air quality. The Supreme Court overturned stating that the court had impermissibly substituted its judgment for that of the agency. When a court reviews an agency construction of a statute, it is confronted with two questions. First is whether Congress has spoken to the precise issue in question. If Congress' intent is clear, that ends the matter as the agency must give effect to the unambiguously expressed intent of Congress. If the Statute is silent or ambiguous with respect to an issue, the court must resolve whether the agency interpretation is based on a permissible construction of the statute. at 843. "Sometime the legislative delegation to the agency is implicit rather than explicit. A court must not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency. Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."

The court noted that the briefs give the indication of a battle over policy that was lost in the agency but never waged in Congress. The rule had been proposed in the waning days of the Carter administration in 1980 and modified by the incoming Reagan administration, a situation not unlike the proposed operating permit rule. Only in Chevron the regulation was changed to the satisfaction of industry, the re-proposal of the permit rule has been changed to the satisfaction of environmentalists and states. Such policy arguments are more properly addressed to legislators or administrators, not to judges.

294 The fourth element, of section 502(b)(6), "for expeditious review of permit actions, including applications, renewals, or revisions, and including an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law. 42 U.S.C. 7661a(b)(6).

295 Element three, establishes a requirement "for public notice, including offering an opportunity for public comment and a hearing, and," 42 U.S.C. 7661a(b)(6).

296 See note 293 *supra*.

297 As EPA general counsel, Elliott had testified before Congress on May 1, 1991 in support of EPAs proposed interpretation of the operational flexibility provision and minor permit modification regulation to implement it. During his testimony Elliott remarked, "I think in fairness, we ought to point out that ...section 502(b)(6) consists of 85 words, 10 commas, and nine subordinate clauses. Now that might be clear as a bell to you, but there is a certain ambiguity in it as far as I am concerned." Regarding the ambiguities, William Rosenberg, EPA's Assistant Administrator for Air and Radiation stated, "You're reminded of Yogi Berra's statement, 'you've come to a fork in the road, take it.'"

298 See note 293, *supra*.

299 42 U.S.C. 7661d(a).

300 This conclusion was based on Hercules, Inc. v. EPA, 938 F.2d 276, 280-281, (D.C. Cir. 1991). Hercules relied on the plain meaning to reject an attempt by EPA to restrict interpretation of a statutory term. Under Hercules, a court could determine that a reduction in emissions allowable was a modification under section 505(a). Note: Hartman the author of the DoJ opinion was lead counsel in Hercules.

301 Public Citizen v. Young, 831 F.2d 1108, (D.C. Cir. 1987). The court discussed the law in the area of de minimis exceptions. They will be inferred except in the case of an unambiguous demonstration of Congressional intent to foreclose them. The DoJ concluded that such an exemption would be available to support a minor permit amendment procedure, provided that the EPA made a showing that the benefit would be a "trivial gain" under the Alabama Power, 636 F.2d 360-.

302 See Associated Gas Distributors v. FERC, 899 F.2d 1250, 1261 (D.C. Cir 1990).

303 Bush Sides With Quayle Council on Dispute With EPA Over Clean Air Permit Notification, *Environmental Reporter*, 5/22/92.

304 Section 70.7, 57 Fed.Reg. 32280, (1992).

305 57 Fed.Reg 32250 - 32312, (July 21,1992) (Proposed for codification at 40 C.F.R. Pt 70).

306 Preamble, II.A., 57 Fed Reg 32252, (1992).

307 Id.

308 Section 70.3(c)(1), 57 Fed. Reg. 32298, (1992).

309 A-90-33, V-C-1 (7/24/92) p 2-17,18.

310 Section 70.2, 57 Fed. Reg. 32297, (1992).

311 Section 70.3(b)(4)(i),(ii), 57 Fed. Reg. 32298, (1992).

312 Section 70.3(b), 57 Fed. Reg. 32297, (1992).

313 56 Fed. Reg. 32263, (1991).

314 Id.

315 57 Fed. Reg. 32263 (1992).

316 57 Fed. Reg. 32269, (1992).

317 57 Fed. Reg. 32253, (1992).

318 See argument articulated in comments submitted by state regulators, *supra* at 49.

319 57 Fed.Reg. 32266, Preamble to 40 C.F.R. Pt. 70, (1991).

320 57 Fed. Reg. 32266, (1991).

321 A-90-33, V-C-I, p 6-17 (8/11/92).

322 Preamble, 57 Fed. Reg. 32267, (1992).

323 EPA illustrates this point with an example. If the SIP limits emission to 5 pounds/hour for both lines A and B of an industrial process, line A may not be operated at 6 pounds/hour, even if the excess emissions are offset from line B's reduced operating at 4 pounds/hour. A-90-33, V-C-1, p 6-18 - 6-20, (7/24/92).

324 Id.

325 Id.

326 Section 70.2(o) 56 Fed.Reg. 21768, (1991), defined flexible source operation as any change provided for in section 70.6(d), Flexible Source Operation.

327 57 Fed.Reg 32297, (1992).

328 Applicable requirements are defined at 70.2, 57 Fed. Reg. 140, p. 32295, and identified standards, requirements or regulations under the CAA that sources are required to meet including applicable implementation plans. Applicable implementation plans include portions of the implementation plan, which has been approved by EPA under section 110 CAA, or a federal implementation plan.

329 Federally enforceable emissions limitations are limits placed on a sources potential that place limits on the potential emissions, allowing the source to be considered minor for purposes of Title V permitting and other requirements of the Act. Several methods exist to create to create federally enforceable limitations. The EPA identified five methods of

creating these limitations: (1) State major and minor new source review permits can place limits on sources, (2) operating permits based on programs approved and incorporated into the SIP pursuant to criteria in 54 Fed. Reg. 27274, June 28, 1989, (3) title V permits (including general permits), (4) SIP limits for individual sources, (5) limits for HAPs created through a State program approved pursuant to section 112(1). See Memorandum, Approaches to Creating Federally Enforceable Emissions Limits, U.S.EPA, Office of Air Quality Planning and Standards, November 3, 1993. The EPA has also developed guidance for creating federally enforceable emission limitations for VOC for a variety of source categories, including auto body shops and surface coaters. See EPA Guidance for State Rules for Optional Federally Enforceable Emission Limits Based on Volatile Organic Compound Use, EPA Air Quality Management Division, October 15, 1993.

330 57 Fed. Reg. 32267, (1992).

331 Id.

332 Section 70.4(b)(12), 57 Fed. Reg. 32299, (1992).

333 Section 70.4(b)(12)(i), 57 Fed. Reg. 32299, (1992).

334 57 Fed. Reg. 32299, (1992).

335 Section 70.4(b)(12)(i)(B), 57 Fed. Reg. 32300, (1992).

336 Section 70.4(b)(12)(ii), 57 Fed. Reg. 32300, (1992).

337 A-90-33, V-C-1, EPA Response to Comments, (8/11/92) 6-18.

338 Section 70.4(b)(12)(iii), 57 Fed. Reg. 32300, (1992).

339 EPA Memo, Approaches to Creating Federally-Enforceable Emissions Limits, Office of Air Quality Planning and Standards, 11/3/93, illustrates the type of source for whom the option of an enforceable emissions cap holds promise, sources of volatile organic compounds arising from use of solvents or coatings, such as auto body shops, fuel burning sources with low actual emissions but with potential emissions in amounts to cause them to be classified as major sources. Enforceable limitations could consist of limits on solvent use, supported by recordkeeping and periodic reporting. State could develop protocols for sources such as gas stations, printers, surface coaters and dry cleaners.

340 57 Fed. Reg. 32269, (1992).

341 Id.

342 Id.

343 Section 70.4(b)(12)(iii), 57 Fed. Reg. 32300, (1992).

344 Id.

345 A-90-33, V-C-1, (8/11/92) p. 6-21.

346 Section 70.4(b)(12)(iii), 57 Fed. Reg. 32300, (1992).

347 57 Fed. Reg. 32305, (1992).

348 57 Fed. Reg. 32276, (1992).

349 A-90-33, V-C-1, (8/11/92) p. 6-25.

350 Section 70.6(a)(10), 57 Fed. Reg. 32305, (1992).

- 351 Preamble, 57 Fed. Reg. 32276, (1992).
- 352 57 Fed. Reg. 32304, (1992).
- 353 Preamble, 57 Fed. Reg. 32270, (1992).
- 354 A-90-33, V-C-1, EPA Response to Comments, (7/24/92) p. 6-27.
- 355 57 Fed. Reg. 32269, (1992).
- 356 Section 70.6(d)(3)(iv), 56 Fed. Reg. 21776, (1991).
- 357 Section 70.4(b)(14)(ii), 57 Fed. Reg. 32300, (1992).
- 358 Section 70.6(d)(3), 57 Fed. Reg. 32307, (1992).
- 359 Section 70.6(d)(1)(v), 57 Fed. Reg. 32307, (1992).
- 360 The preconstruction review permits must be authorized under an EPA approved program, provided such a program meets procedural requirements equivalent to sections 70.7, and 70.8, permit review by EPA and affected states, if the change were subject to review as a permit modification.
- 361 A-90-33, V-C-1, EPA Response to Comments, (1992) p 7-6.
- 362 A-90-33, V-C-1, EPA Response to Comments, (1992) p 7-5.
- 363 CAA Section 112(g), Modifications, 42 USC 7412(g).
- 364 Section 70.6(d)(3)(iii), 57 Fed. Reg. 32307, (1992).
- 365 Section 70.7(e)(2), 57 Fed. Reg. 32307, (1992).
- 366 Section 70.7(f), 56 Fed. Reg. 21777, (1991).
- 367 See comments of Texaco text, *supra* p.49.
- 368 Section 70.6(e)(2), 57 Fed. Reg. 32307, (1992).
- 369 Section 70.7(e)(1), 57 Fed. Reg. 32307, (1992).
- 370 Section 70.7(e)(2), 57 Fed. Reg. 32307, (1992).
- 371 Applicable requirements is defined at section 70.2, 57 Fed. Reg. 32295, (1992). Under this provision a source can not make a change that would violate emission control technology requirements, i.e. MACT, NESHAP, reasonably available control technology limits (RACT) contained in a SIP, NSPS, best available control technology (BACT), lowest achievable emission reduction (LAER) or work practices established pursuant to a SIP.
- 372 57 Fed. Reg. 32307, (1992). This section provides states discretion to use the minor permit modification process for certain types of changes. From industry's perspective this provides the state with the exception which swallows the rule.
- 373 See 40 C.F.R. § 52.21(b)(23).
- 374 Section. 70.7(f)(2), 56 Fed. Reg. 21777, (1991).
- 375 57 Fed. Reg. 32281, (1992).
- 376 Section 70.7(e)(2)(v), 57 Fed. Reg. 32308, (1992).
- 377 Section 70.7(e)(2)(i)(3), 57 Fed. Reg. 32308, (1992).

378 Section 70.7(e)(2)(iii),(iv), 57 Fed. Reg. 32308, (1992).

379 Id.

380 Section 70.7(e)(2)(v), 57 Fed. Reg. 32308, (1992).

381 Section 70.7(e)(2)(v), 57 Fed. Reg. 32308, (1992).

382 See state regulators comments, text *supra*, p. 49.

383 Section 70.7(e)(3), 57 Fed. Reg. 32308, (1992).

384 A-90-33, V-C-1, EPAs Response to Comments, (7/24/92) p. 7-21.

385 Section 70.7(e)(i)(3), 57 Fed. Reg. 32308, (1992).

386 Section 70.7(e)(3), 57 Fed. Reg. 32308, (1992). This provision was based on discussion in *Alabama Power*, *supra* note 287.

387 Section 70.7(e)(4), 57 Fed. Reg. 32309, (1992).

388 Section 70.7(e)(4)(i), Id.

389 Section 70.7(e)(4)(ii), Id.

390 Section 70.7(h)(i), 57 Fed. Reg. 32309, (1992).

391 Section 70.7(h)(4), Id.

392 Section 70.7(e)(4), 57 Fed. Reg. 32309 (1992).

393 *Clean Air Implementation Project v. EPA*, (D.C. Cir.) docket no. 92-1303, (11/12/92). After CAIP filed its petition for review of the operating permit regulation, environmental organizations including NRDC, Sierra Club and Environmental Defense Fund filed motions to intervene. Additional industry intervenors included MVMA, Synthetic Organic Chemical Manufacturers Association. States then intervened. Issues identified as a basis for the action include whether the final rule's operational flexibility are lawfully limited in accordance with the CAA. This can be viewed in the nature of a preemptive strike by industry, allowing it to stay involved in the settlement process. Most sophisticated industry commenters had defended the Bush Administration proposal initially by noting that the statute was not clear as to exactly what was required, thus leaving the Administrator with discretion to implement the operational flexibility.

394 During the rulemaking phase, the CAIP stated it was of the utmost importance that EPA not restrict the minor permit amendment authority more than it was so already. See A-90-33, IV-D-204.

395 EPA Proposal to Revise Flexibility Provisions in Permit Rule, *reprinted in* Clean Air Report, 4/7/94, p 3, 4, and 28-32.

396 On July 7, 1994 I spoke with Mr. Roger Powell, project manager, USEPA, Air and Radiation, Research Triangle, North Carolina, regarding the reproposal of the operational flexibility component of part 70. Mr. Powell advised that an EPA "Whitepaper" working draft of the reproposal had inadvertently been released and "gotten out" of EPA. This prompted EPA to issue the March 21, 1994 draft for public notice which appeared in among other publications, BNA Environmental Reporter. Powell advised his staff was working on the draft for the Administrator to sign as we spoke and that it would then take

several weeks to get something published in the Federal Register. There would be changes from the draft as released but they would be relatively minor. Provisions involving major source determinations, applicable pollutants, and requirements were not going to change. The reproposal will go through the rulemaking process, complete with public comment before becoming final. After approximately a year or so given past experience, the rule will become final. States will be given additional time to modify their programs to bring them into compliance with the modified operational flexibility provision. Those with programs based on the final rule will be able to obtain interim status but will have two years to modify their programs to comply with the reproposal.

397 State Operating Permit Programs, 57 Fed. Reg. 32295, (7/21/92).

398 Section 70.2, Part 70 Operating Permit Regulations, Proposed Changes, Redline/Strikeout Version, (7/8/94).

399 Section 70.2, Part 70 Operating Permit Regulations, Proposed Changes, Redline/Strikeout Version, (7/8/94).

400 56 Fed. Reg. 21746, (1991).

401 A-90-33, V-C-1, EPA Response to Comments, (8/11/92) p 7-20.

402 Section 70.2, Part 70 Operating Permit Regulations, Proposed Changes, Redline/Strikeout Version, (7/8/94). (hereinafter cited as Reproposal).

403 EPA Operating Permits Program, Proposed rule revisions, obtained from the EPA bulletin board, (7/13/94). This document does not discuss the changes to the permit modification procedures. It focuses on changes that will have to be made to the interim approval procedures because state programs that have already been approved, they were required to be submitted to EPA 11/15/93, will no longer comply with the EPA permit program in its latest version for reproposal.

404 Hercules Inc. v. EPA, 938 F.2d. 280, (1991). The court held that where statutory language is plain, the sole function of a court is to enforce it according to its own terms. Thus the court refused to allow EPA to read a restricting limitation into a statutory term by regulation.

405 Reproposal section 70.2. This definition is not new as it was included with the EPA explanation of major source in EPA's Response to Comments Document, A-90-33, V-C-1.

406 Reproposal section 70.7(e)

407 Reproposal section 70.7(e)(1)(i-v)

408 Reproposal section 70.7(e)(1)(v).

409 Reproposal section 70.7(e)(3)(i)(A)-(D).

410 Reproposal section 70.7(e)(3)(i)(ii).

411 Id. at section 70.7(e)(3)(v).

412 Reproposal section 70.7(e)(1)(vi).

413 Section 70.7(d)(v), 57 Fed. Reg. 32307, (1992).

414 Reproposal section 70.7(e)(4)(i)(A)-(D).

- 415 Reproposal section 70.7(e)(4)(i)(D).
- 416 CAA section 503(c), 42 U.S.C. 7661b(c).
- 417 Reproposal section 70.7(e)(4)(ii)(B).
- 418 Id. at section 70.7(e)(4)(ii)(D).
- 419 Id. at section 70.7(e)(4)(iii).
- 420 Id. at section 70.7(e)(4)(iv).
- 421 Id.
- 422 Id. at section 70.7(e)(4)(v).
- 423 Reproposal section 70.7(e)(1)(vii).
- 424 Seitz, Director Office of Air Quality Planning and Standards, Memo-Title V Program Approval Criteria for Section 112 Activities, U.S. EPA, (4/13/93), Atch 5.
- 425 Reproposal section 70.7(e)(5).
- 426 Id. at section 70.7(e)(5)(i)(D).
- 427 Reproposal section 70.7(f)(1).
- 428 Reproposal section 70.7(f)(2)(i)(D).
- 429 EPA Outline For A Proposal To Revise The Flexibility Provisions of The Permit Rule, 3/21/94, *reprinted in* Environmental Reporter, (4/5/94) at p. E-2.
- 430 Reproposal section 70.7(f)(2)(ii).
- 431 Note 429, *supra* at E-6.
- 432 Section 112(g), 42 U.S.C. 7412(g). The de minimis increases will be set in regulations enacted by EPA pursuant to this section.
- 433 Reproposal section 70.7(f)(2)(iii)(A)(2).
- 434 Reproposal section 70.7(f)(2)(iii)(B)(1).
- 435 Reproposal section 70.7(f)(3)(i)(A)-(D).
- 436 Reproposal section 70.7(f)(3)(ii).
- 437 Reproposal section 70.7(f)(3)(iii).
- 438 Reproposal section 70.7(f)(3)(iv)(A).
- 439 Reproposal section 70.7(f)(3)(iv)(B).
- 440 Reproposal section 70.7(f)(3)(vii).
- 441 Reproposal section 70.7(f)(2)(viii).
- 442 Reproposal section 70.7(g)(1)(B).
- 443 Reproposal section 70.7(g)(1)(B).
- 444 Reproposal section 70.7(g)(1)(C).
- 445 Reproposal section 70.7(g)(2)(E).
- 446 Reproposal section 70.7(g)(3).

- 447 Reproposal section 70.7(g)(5).
- 448 Reproposal section 70.7(g)(5)(i)(C).
- 449 Reproposal section 70.7(g)(7).
- 450 Reproposal section 70.7(g)(2).
- 451 Reproposal section 70.7(h).
- 452 Section 70.4(b)(12)(i), 57 Fed. Reg. 32307 (1992).
- 453 Note 451 *supra*.
- 454 Reproposal section 70.4(b)(12)(iii).
- 455 40 C.F.R. Part 70 Operating Permit Regulation, Proposed Changes, Redline/Strikeout Version of Part 70, (7/8/94) as obtained from the EPA Bulletin Board, 7/13/94.
- 456 Reproposal section 70.4(b)(12)(ii).
- 457 A-90-33, V-C-1, (8/11/92) p. 6-21.
- 458 Reproposal section 70.6(a)(9)
- 459 Note, doubtless with the support of the post office.
- 460 Continuous Emissions Monitoring (CEM), equipment used to sample, analyze, measure and provide on a continuous basis a permanent record, is defined at Section 402(7) of the Act, 42 U.S.C. 7651a(7).
- 461 42 U.S.C. 7661f(g).
- 462 EPA Proposal to Revise Flexibility Provisions in Permit Rule, 3/21/94, *reprinted at* Clean Air Report, 4/7/94, p 30,31.
- 463 42 U.S.C. 7651k(a).
- 464 Enhanced Monitoring Program, 58 Fed. Reg. 54648, (to be codified at 40 CFR pts 40, 51, 52, 60, 61, and 64.
- 465 Note 462 *supra*, p. 30.
- 466 Section 70.4(b)(12)(i), 57 Fed. Reg. 32299 (1992).
- 467 Reproposal section 70.4(b)(14)(i)(B), to be codified at 40 C.F.R. 70.
- 468 Reproposal section 70.4(b)(14)(vii)(B), to be codified at 40 C.F.R. 70.
- 469 Reproposal section 70.4(b)(14)(v), to be codified at 40 C.F.R. 70.
- 470 CAA sections 113(b),(d), 42 U.S.C. 7413(b),(d) allow EPA to assess penalties through the civil judicial process or administratively. The EPA can assess penalties of \$25,000 per day for each day of violation.
- 471 Reproposal section 70.4(b)(14)(iii), to be codified at 40 C.F.R. Pt. 70.